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IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM 1993

No. _____

ORVILLE AMBURGEY,

Petitioner,

vs.

THE CITY OF COSTA MESA, a Municipal Corporation; THOMAS A. KATHE, City Attorney for the City of Costa Mesa, an individual; ALLAN ROEDER, City Manager for the City of Costa Mesa, an individual; MARY HORNBUCKLE, an individual; and DOES 1-100, inclusive.

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF CALIFORNIA

PETITION FOR WRIT OF CERITORARI

LAW OFFICES OF
LAWRENCE K. HARVEY
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Costa Mesa, CA 92627
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123 pp

QUESTIONS PRESENTED FOR REVIEW

1) Whether a City Attorney is entitled to absolute prosecutorial immunity for supervision of and participation in a six month long pre-arrest investigation?

2) Whether a City Attorney who makes an out of court public statement in which he falsely asserts that the Petitioner is guilty and charged with a felony offense, misrepresents evidence to the District Attorney and releases this false information to the press, is protected by absolute prosecutorial immunity against civil liability?

3) Whether City Council Members who conspire with the City Attorney to manufacture false evidence which inculpates the Petitioner, and who likewise make out of court statements in furtherance of this conspiracy, are entitled to absolute legislative immunity?

4) Whether the City Attorney and the Petitioner, a City Council Member, have an Attorney-Client relationship?

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OPINIONS BELOW

The Supreme Court of California declined to hear this case on March 21, 1994; no opinion, official or unofficial, exists. The unpublished written opinion of the Court of Appeal for the State of California Fourth Appellate District, Third Division, appears in Appendix A to this Petition. Petitioner's appellant brief appears in Appendix B to this Petition. Petitioner's appellant reply brief appears in Appendix C to this Petition. The Official Statements of Decision of the Orange County Superior Court appear in Appendix D to this Petition. Petitioner's Proposed Second Amended Complaint appears in Appendix E to this Petition.

JURISDICTION

The Supreme Court of California declined to hear this case on March 21,1994. This timely Petition is filed under the jurisdiction of Title 28, U.S.C. § 1257.

STATUTORY PROVISIONS

Any and all United States Statues and references to the California Government Code will be cited in the text of this Petition.

STATEMENT OF THE CASE

In June of 1990, Orville Amburgey, Petitioner herein, was an elected City Council Member for the City of Costa Mesa, California. Petitioner had held the paid position of City Council Member for four years.

A closed session of the City Council was held in September of 1990 to discuss the performance evaluation of Respondent, City Attorney Thomas Kathe. Four members of the City Council were present. Respondent Kathe's probationary term of employment had ended, making it necessary for the City Council to decide whether to terminate or continue his employment. During this meeting, Petitioner voted to terminate Respondent Kathe for reasons of incompetence, and voted against a salary increase for Respondent Kathe. Petitioner made his reasons for voting against Respondent Kathe known to the other present City Council Members. However, because a majority of the entire City Council was not present for voting, the results were not valid.

At the next City Council meeting one week later, the City Clerk stated that the vote needed to be repeated by the majority to be valid. Because this meeting was an open session, Respondent Kathe was present during the voting on his employment and salary increase. Petitioner again voted to

terminate the employment and against the salary increase. This incident began a series of actions taken by Respondent Kathe which were intended to remove Petitioner from the City Council.

Additionally, Petitioner was politically opposed to Respondent Hornbuckle on many issues which divided the City Council. Respondent Hornbuckle, and her coalition of fellow City Council Members, constantly attempted to overrule the vote of Petitioner. Respondent Hornbuckle wished to remove Petitioner from the City Council so her issues could pass through the City Council easier. Respondent Hornbuckle became involved with Respondent Kathe's scheme to remove Petitioner from office through her access to information and private meetings with Respondent Kathe.

Respondent Roeder became involved with the conspiracy through his meetings with Respondents Kathe and Hornbuckle, and also through an official report which he manufactured and gave to Respondent Kathe as evidence.

The Respondents knew that the easiest way to remove Petitioner from office would be to ensure that he would not be re-elected for another term. The Respondents used Petitioner's source of outside income as a tool to invent an alleged conflict of

interest for Petitioner.

Petitioner owned an electric contracting company, which he operated in addition to fulfilling his duties as a City Council Member. His electric company, Amburgey Electric, performed contracting work for Copley Colony, the city's cable contractor.

In October of 1990, Petitioner was involved in a heated re-election campaign to retain his council position for another term. Shortly before the general election, Petitioner learned that a local newspaper had requested copies of Copley Colony invoices which involved Amburgey Electric. Petitioner then contacted the newspaper and advised the newspaper that he would provide any information which was requested. The newspaper made no further contact with him regarding the invoices.

Six days prior to the general election, Respondents Hornbuckle, Kathe, and Roeder released information to the press alleging that Petitioner had committed a felony while acting as a City Council Member. Respondent Hornbuckle specifically told the press that Respondent Kathe had filed charges against Petitioner with the District Attorney, which in turn filed a criminal complaint against Petitioner for an alleged conflict of interest in violation of

California Government Code sections 87100[1], 87103[2] and Political Reform Act section 91000[3]. The basis of the complaint was an alleged conflict of interest between Petitioner and Copley Colony, the city's cable contractor. All three of the major newspapers, including the newspaper which inquired about the invoices, printed articles relating the allegations against Petitioner.

In letters to the District Attorney's Office, Respondent Kathe outlined an investigation that he conducted from May to October which he claimed showed that Petitioner had voted on the cable television contract while maintaining a financial interest in

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[1] Section 87100 provides in part: "No public official. . . shall make, participate in making or in any way attempt to use his official position to influence a governmental decision in which he knows or has reason to know he has a financial interest."

[2] Section 87103 states in part: "An official has a financial interest in a decision. . . if it is reasonably foreseeable that the decision will have a material financial effect, distinguishable from its effect on the public generally, on the official or a member of his or her immediate family. . . ."

[3] Under section 91000, a violation of the Political Reform Act is prosecuted as a misdemeanor.

the franchise company. Respondent Kathe based his allegations on a review of city documents, interviews of witnesses, and a review of public records. The District Attorney did not know that Respondents Kathe and Roeder had manufactured documents to support the case against Petitioner.

On May 30, 1990, Council Member Ed Glasgow asked Respondent Kathe to review the purchasing procedures on the contracts involving the City of Costa Mesa. Respondent Kathe subsequently send a memorandum via Respondent Roeder to all department heads requesting copies of all contracts for the past three years. Although the contract involving Petitioner's business was four years old, Respondent Kathe used the request from Council Member Ed Glasgow as a pretext to particularly look for alleged evidence against Petitioner. Respondent Kathe's investigation into Petitioner's alleged wrongdoing began in May, but Respondent Kathe delayed pursuing this information until he released the report on October 31, 1990, five months later.

Although the report from Respondent Kathe referenced several issues of apparent misconduct throughout the city, only the matter involving Petitioner was pursued. The matter involving Petitioner was discussed in open session of the City Council

meetings, while all other matters of apparent misconduct were discussed in closed session meetings and dismissed.

The City Attorney's office produced a supposedly confidential report outlining the issues of apparent misconduct, not to be released to the City Council until November 3, 1990. Respondent Roeder told one of the newspapers that the report was not finished and therefore not available. However, Respondent Hornbuckle was given access to this information before the City Council, and before Petitioner. The only persons who had access to this information and could have forwarded it to Respondent Hornbuckle were Respondents Kathe and Roeder. She knew that the specific allegations against Petitioner involved a June 1987 City Council meeting in which the Copley Colony cable contract was discussed. However, at this City Council meeting in June of 1987, no vote was taken regarding modification of the contract.

The October 31, 1990 memorandum to the City Council from the City Attorney's office regarding the review of contracts opened with the statement that Respondent Hornbuckle on October 30 had asked for an explanation of the alleged misconduct report. This memorandum was written to the City Council the same day that the articles damaging to Petitioner appeared in the

three major newspapers, but the memorandum was not delivered to the City Council until November 3. The fact that Respondent Hornbuckle was asking for an explanation of the report shows that she had access to the information contained in the report prior to all other Members of the City Council, including Petitioner.

Respondents Hornbuckle and Roeder assisted Respondent Kathe in conducting his investigation; these individuals met on several occasions to discuss the progress of the investigation, including which avenues to pursue in developing evidence to substantiate the charges against Petitioner.

Petitioner was never questioned nor advised as to the investigation or the conclusions reached by the Respondents until he was contacted by the newspapers six days before the election. Once he learned of the allegations, Petitioner conducted his own investigation and learned that the accusations were entirely without merit. Petitioner obtained a copy of the minutes of the June 1987 City Council meeting in question, which discuss only the recommendation by Respondent Roeder to the City Council to approve the modification of the agreement with Copley Colony; there is no vote regarding the Copley Colony contract. Petitioner also obtained a tape recorded copy of the meeting from

independent parties known by City Officials to tape report all City Council meetings. Respondent Roeder was aware, or should have been aware of the practice of tape recording the meetings. This recorded copy of the minutes likewise reveals that there was no vote taken to modify the contract. At this meeting the City Council approved the performance evaluation of Copley Colony, which gave Copley Colony and Amburgey Electric no advantage and was not in violation of any statute or laws.

In June of 1989, Respondent Roeder prepared a modified cable contract agreement and falsely stated that the City Council had voted and approved the modification. The City Council was advised to accept the modification, but no vote was taken at the June 1987 meeting; the request for modification was expressly excluded from the vote. Respondent Roeder was present at this meeting, and knew or should have known the true facts when he prepared the report.

On September 12, 1990, Respondent Kathe met with Respondent Roeder to advise Roeder of the investigation into the alleged conflict of interest. Respondent Kathe advised Respondent Roeder that if there was evidence of a conflict of interest, Roeder should do the following: notify Petitioner and Copley Colony of the

possible violation; notify the City Council and obtain permission to conduct an investigation; and refer the matter to the police department for investigation. None of these three steps was taken.

Instead of following his own recommendations, Respondent Kathe continued to investigate and subsequently took the file to the District Attorney for an additional confidential investigation. Respondent Kathe did all investigation and initiation. He did not contact the Costa Mesa Police Department, the investigative arm of the city, until the day prior to meeting the District Attorney. He took the Chief of Police to the District Attorney's office and implied during the meeting that the police had done an investigation. The Police Department has stated that it never conducted or was advised to any investigation until that day. The District Attorney was given the council meeting minutes, and a copy of the falsified document manufactured by Respondent Roeder. The District Attorney's office filed a compliant based on the information it was given. A complaint was entered for the arrest of Petitioner, and Petitioner was summoned to court. Petitioner was later released on his own recognizance.

The District Attorney was still working on the file as the

election neared, but Respondents Kathe and Hornbuckle released the information to the press despite the fact that this was a confidential investigation. Respondent Kathe had possession of the City Council meeting minutes in question, and knew or should have known that no vote was taken at the meeting, yet he deliberately misrepresented the information. He knowingly used manufactured evidence and forwarded this falsified evidence to both the District Attorney and the press.

Further, Respondent Kathe went to the District Attorney on the same day that a City Council meeting was held. He did not inform the City Council majority at the meeting, as is required by the municipal code. He notified the City Council members individually because there was no closed session or open session with the matter on the agenda, in violation of the Brown Act.[4] Petitioner and City Council Member Glasgow were not advised at any time, nor was the matter agendized.

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[4] California Government Code § 54950 et. seq. (Brown Act) provides in part that all matters must be placed on the agenda to be discussed at the meetings, or that the matter shall be discussed in closed session, after giving at least 72 hours notice to those expected to be present.

Petitioner presented his evidence in May of 1991, when the complaint against him was filed to the District Attorney, who then agreed to dismiss the case. All charges against him were dropped, but the actions of the Respondents could not be rescinded.

During Petitioner's investigation, he learned that Respondent Roeder had manufactured official city documents and reports that were inaccurate, which were used by Respondents Kathe and Hornbuckle to substantiate their position. Petitioner learned that the Respondents, in the manner of their actions, wanted to unseat Petitioner from the City Council and thus were motivated to release the unsubstantiated allegations without offering him any due process or an opportunity to rebut the allegations. As a result, Petitioner lost the election and was replaced on the City Council.

Two weeks before the election, a poll indicated that Petitioner was winning the election by a large margin. In 1986, Petitioner won the election by a landslide. As a result of the Respondents' actions, Petitioner finished fourth of five candidates. Respondent Kathe admits that his office conducted an investigation and continues to refuse to rectify or admit any wrongdoing.

Upon dismissal of the complaint by the District Attorney, Petitioner asked for a reimbursement of attorney's fees of approximately $14,000 to defend the criminal action. Even though authorized by statute to reimburse a City Officer that has been sued in a civil action or charged in a criminal action, the City Council refused to authorize payment.[5]

On September 23, 1991, Petitioner filed a complaint against the Respondents for a deprivation of civil rights, legal malpractice, breach of fiduciary duty, conspiracy and other related counts. On February 26, 1992, the court sustained the Respondents' demurrer to the complaint.

On March 23, 1992, Petitioner filed an amended complaint alleging the same causes of action with a different statement of facts. On June 3, 1992, the court sustained the Respondents' demurrer to the amended complaint without leave to amend. The court found that Petitioner's civil rights cause of action failed to allege violation of a federally protected right, and that the

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[5] California Government Code § 996.4 provides that a City Official is entitled to reimbursement of reasonable legal fees used to provide a defense in a civil action or a criminal action.

Respondents were entitled to absolute immunity. Furthermore, the court found that Petitioner and Respondent Kathe did not have an attorney-client relationship.

On June 16, 1992, Petitioner filed a motion for reconsideration with a proposed second amended complaint. On September 23, 1992, the court reconsidered its prior ruling and the proposed complaint and ordered that the original ruling was to stand, finding that Petitioner failed to state a cause of action.

On September 30, 1992, Petitioner filed an appeal with the Court of Appeal for the State of California, Fourth Appellate District. On November 18, 1993, the Court of Appeal, in its opinion[6], affirmed the trial court's judgment, which sustained the Respondents' demurrer to the amended complaint without leave to amend. The court stated that although an order sustaining the demurrer without leave is not appealable (Code Civ. Proc., § 904.1)[7], in the interests of justice and to prevent unnecessary

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[6] Hereinafter, all references to the California Fourth District Court of Appeal will be cited as (opinion,) with the page number noted in the citation.

[7] Section 904.1 provides that an order sustaining the demurrer without leave to amend is not appealable.

delay it deemed the order sustaining the demurrer to incorporate the judgment and treated the notice of appeal as being taken therefrom (opinion, 2 nt.1).

On December 2, 1993, Petitioner filed a petition for rehearing on the issue of filing the proposed second amended complaint. The petition was denied on December 16, 1993.

On December 27, 1993, Petitioner filed a petition for review by the California Supreme Court. The California Supreme Court declined to hear the case on March 21, 1994. Petitioner then filed this petition for writ of certiorari to the California Supreme Court.

ARGUMENT

Through its decision in Burns v. Reed, 500 U.S. ____ (1990) this Court has recognized the need to redefine the scope of absolute prosecutorial immunity, particularly in the area of investigative prosecutorial acts, in light of the added protection afforded government officials by Harlow v. Fitzgerald, 47 U.S. 800 (1982) and its progeny. The importance of these issues is highlighted by the fact that they arise here in a politically significant case, which implicates questions concerning improper conduct by the city officials of the City of Costa Mesa, and the wrongful accusations and charge of an innocent man.

The lower court's decision refuses to follow Burns, relies heavily on an expansive view of Imbler v. Pachtman, 424 U.S. 409 (1975), and expands the scope of absolute prosecutorial immunity in a way which is contrary to Harlow v. Fitzgerald and its progeny, including the recent decision in Buckley v. Fitzsimmons, 93 D.A.R. 7961 (1993). This Court held in Burns that the expanded scope of qualified immunity, as first established in the post-Imbler decision of Harlow v. Fitzgerald, requires a narrowing of these absolute immunities, as well as the scope of Imbler itself:

> The qualified immunity standard is today more protective of officials that it was at the time that Imbler was decided. 'As the qualified immunity defense has evolved, it provides ample support to all but the plainly incompetent or those who knowingly violate the law.' Malley v. Briggs, 475 U.S., 335 (1986); see also Mitchell v. Forsyth, 472 U.S., 511, 524 (1985).
>
> In Harlow v. Fitzgerald, we 'completely reformulated qualified immunity,' Anderson v. Creighton, 483 U.S. 619 (1987), replacing the common law subjective standard with an objective standard that allows liability only where the official violates 'clearly established statutory or constitutional rights of which a reasonable person would have known.' Harlow, *supra*, 457 U.S., at 818. This change was specifically designed to avoid excessive disruption of government and permit the resolution of many insubstantial claims on summary judgment,' and we believe it sufficiently serves that goal," Malley, *supra*, 475 U.S., at 341 (1986); see also Mitchell v. Forsyth, *supra*, 472 U.S. 511, 524 (1985).

> Accordingly, it satisfies one of the principal concerns underlying our recognition of absolute immunity. See, e.g. Imbler, *supra*, 424 U.S. at 419 (further citation omitted).

Burns v. Reed, *supra*, 111 S.Ct. at 1944, 1944 nt. 8.

In the concurring opinion of Burns, the Justices went further, noting the historical and legal errors of the Imbler opinion, in particular the complete lack of common law precedent for prosecutorial immunity for any out of court acts, and raising serious questions concerning the continued vitality of Imbler in circumstances which extend beyond actual in-court conduct, 111 S.Ct. at 1945, 1949.

This Court went beyond Burns in Buckley v. Fitzsimmons, *supra*, 93 D.A.R. 7961 (1993). In Buckley, this Court stated that

> "there is no common-law immunity for prosecutor's out-of-court statements to the press, and, under Imbler, such comments have no functional tie to the judicial process just because they are made by a prosecutor. Nor do policy considerations support extending absolute immunity to press statements, since this Court has no license to establish immunities from § 1983 actions in the interest of what it judges to be sound public policy, and since the presumption is that qualified rather than absolute immunity is sufficient to protect government officials in the exercise of their duties."

Buckley v. Fitzsimmons, *supra*, 93 D.A.R. 7961 (1993). Although the Buckley case involved a conspiracy by prosecutors and law

enforcement officials against a criminal Respondent, it is comparable here to the conspiracy by city officials against Petitioner.

I. THE CALIFORNIA SUPREME COURT'S REFUSAL TO HEAR THIS CASE, SUSTAINING THE APPELLATE COURT'S EXTENSION OF ABSOLUTE PROSECUTORIAL IMMUNITY TO CLEARLY INVESTIGATIVE ACTS IS IN CONFLICT WITH THIS COURT'S DECISION IN BURNS, AND WITH NUMEROUS DECISIONS IN THE MAJORITY OF THE COURTS OF APPEALS; IS INCONSISTENT WITH THE FUNCTIONAL APPROACH ARTICULATED BY THIS COURT IN BUTZ AND FORRESTER; AND IS AN UNWARRANTED EXTENSION OF IMBLER.

Petitioner alleges in his complaint that the Respondent city officials, in conspiracy with each other, performed numerous investigative acts, some of which predated any judicial proceedings by almost a year. These acts included manufacturing official city documents, and deliberate misrepresentation of facts to the District Attorney, the press and the public. Petitioner further alleges that these city officials performed other investigative functions in conspiracy with each other, by meeting to discuss further actions to be taken against Petitioner, by misrepresenting the facts to the District Attorney, by soliciting statements from electrical inspectors and other officials against Petitioner, and by failing to inform the police department until the day before the

scheduled meeting with the District Attorney. [paragraphs 6, 8, 9, 10, 11, 13, 14] The Petitioner also alleges that these investigative acts deprived him of his civil rights.

This Court's decision in Burns clearly established that the conduct and acts of the prosecutors in Buckley in interrogating witnesses and obtaining and/or manufacturing evidence is investigative. Here, the conduct of the city officials in soliciting statements from witnesses and obtaining and/or manufacturing the report is investigative under Burns and Buckley. In Burns the manufactured evidence was a hypnotized "confession", and in Buckley the manufactured evidence was a falsified bootprint at a crime scene; here it is the manufactured report of the City Council vote. If giving advice concerning such acts is investigative, as this Court held in Burns, it is clear that the acts themselves are also investigative and therefore not entitled to absolute immunity.

There is a factual similarity between the three cases. All of the men were charged, but none were convicted. Burn's and Petitioner's charges were dropped before trial, Buckley's after. None sought damages from the officials for the investigation itself. In each instance the interrogations and manufactured evidence played a crucial role in obtaining a probable cause determination,

and therefore in their injuries. The Burns decision supports Petitioner's position that these prosecutorial acts are investigative, and that the timing and locus of the injury does not effect that determination.

In Buckley, the prosecutors committed non-immunized investigative acts in furtherance of the conspiracy, which continued with the same actions by the police and others. In Petitioner's case, the Respondent City Officials committed non-immunized investigative acts in furtherance of the conspiracy, which continued with their additional acts. This continuation of the conspiracy caused the false information to be forwarded to the District Attorney, who filed charges against Petitioner. Although this Court in Imbler did not decide whether absolute immunity should extend to "those aspects of the prosecutor's responsibility that cast him in the role of an investigative officer rather than of an advocate" (Imbler v. Pachtman, *supra*, at pp. 430-431), that decision was articulated in the Burns and Buckley cases. That decision was also articulated in Briggs v. Stafford/Goodwin, 569 F.2d 10 (D.C. Cir 1977), where the court granted only a qualified immunity to prosecutors acting in an investigative capacity.

Petitioner's allegations are that these acts are clearly

investigative acts by Respondents. Most obviously investigative are obtaining statements and searching for official documents to support the position. The lower court's holding, that these acts are not investigative, and its rationale therefore also conflict with numerous decisions in the district courts, most particularly Barbera v. Smith, 836 F.2d 96 (2d Cir. 1987) which held that the function of acquiring evidence jointly with law enforcement officials, prior to arrest and prosecution, is investigative, which does not require absolute immunity. This decision is even more applicable because the City Attorney acquired all the evidence on his own- he did not contact the law enforcement officials until the evidence had been 'acquired'. See also Hampton v. Hanrahan, 484 F.2d 601 (7th Cir. 1973); Briggs v. Stafford/Goodwin, *supra*, 569 F.2d 10,23 (D.C. Cir. 1977), cert. den. 98 S.Ct. 3089 (1978); Forsyth v. Kleindeinst, 599 F.2d 1203, 1215 (3rd Cir. 1979); McSurely v. McClellan, 697 F.2d 309 (D.C. Cir. 1982); and Gobel v. Maricopa County, 867 F.2d 1201 (9th Cir. 1989). Therefore, this important conflict should be resolved by this Court, in light of its decision in Burns and Buckley, and applied to city officials.

II. THE CALIFORNIA SUPREME COURT'S REFUSAL TO HEAR THIS CASE, SUSTAINING THE APPELLATE COURT'S HOLDING THAT PREJUDICIAL OUT OF COURT PUBLIC

STATEMENTS BY A CITY ATTORNEY ARE CLOAKED WITH ABSOLUTE PROSECUTORIAL IMMUNITY, IS IN DIRECT CONFLICT WITH PRIOR DECISIONS OF THE ELEVENTH CIRCUIT COURT OF APPEALS; AND IT IS IN CONFLICT WITH THE DECISIONS OF NUMEROUS OTHER COURTS OF APPEALS AND WITH THIS COURT'S DECISIONS IN BURNS V. REED AND PAUL V. DAVIS; ADDITIONALLY, IT IS AN UNWARRANTED EXTENSION OF THIS COURT'S HOLDING IN IMBLER V. PACHTMAN

Petitioner alleges that the Respondents orchestrated and participated in a publicity campaign which injured him and prejudiced him in the community, so much that he lost his re-election campaign and adversely affected his business. This publicity campaign included false statements made to the press, and incorrect statements to the District Attorney and other members of the City Council. These statements alleged to the entire community that Petitioner had committed a felony by violating the conflict of interest provision in the California Government Code.

The California Appeals Court held that Respondents were entitled to absolute immunity for their statements. Petitioner alleges several injuries which were caused by the Respondent's conduct -- violation of civil rights, failure to be allowed to compete equally in the election, monetary loss to his business and loss of compensation as a Council Member, occasioned by these

prejudicial statements. This injury satisfies the test of Paul v. Davis, 424 U.S. 693 (1976). As stated in Lubey v. City and County of San Francisco 98 CA3d 340 (1979):

> "But there is an important exception to this rule, which is founded upon the Fourteenth Amendment. It arises where there is a deprival of the "liberty" guaranteed all persons by that amendment's due process clause. The exception will be applied where the probationary employee's job termination, or dismissal, is based on charges of misconduct which "stigmatize" his reputation, or "seriously impair" his opportunity to earn a living (Paul v. Davis, 424 U.S. 693, 702, or which "might seriously damage his standing or associations in his community" (Board of Regents v. Roth, 408 U.S. 564, 573 (1972); and to the same effect see McNeill v. Butz, 408 F.2d 314, 319; Daniel v. Porter, 391 F.Supp. 1006, 1010 (1975).)
>
> Where there is such a deprival of a "liberty interest" the employee's "remedy mandated by the Due Process Clause of the Fourteenth Amendment is 'an opportunity to refute the charge' [and] 'to clear his name.'" (Codd v. Velger, 429 U.S. 624, 627 (1977).)

As stated in Haight v. City of San Diego, 228 CA3d 413 (1991), the liberty interest is infringed only when the statement is made in connection with the loss of a government benefit, such as employment. Petitioner must allege that Respondents damaged Petitioner's reputation and altered or extinguished a state law right or status (opinion, 7). Petitioner alleges a government interest, that of being employed as a City Council Member for the City of Costa

Mesa (Petitioner's proposed second amended complaint, paragraph 4)[8]. Petitioner further alleges that his liberty interest has been deprived based on the misconduct of the Respondents in their acts which stigmatized his reputation and seriously impaired his standing in the community (paragraph 20). It is alleged that the stigma attached to his name has impaired his ability to earn a living as a City Council Member, or in any elective capacity whatsoever in the future and has further impaired his ability to earn a living.

The crux of Petitioner's claim is that the actions of Respondents extinguished the right to equally compete in an election for City Council Member, or to earn a living in the community. In Gold v. Los Angeles Democratic League, 49 CA3d 365 (1975), the court held that the misconduct of the respondents extinguished the petitioner's right to equally compete for election with the other candidates. This right to run for election on equal grounds is a state law right or status. Respondents' misconduct qualifies as the injury required in the Paul v. Davis test.

The decision of the lower court conflicts with previous

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[8] Hereinafter, all citations to the petitioner's proposed second amended complaint will only state the paragraph where the citation is contained.

decisions of three appellate circuits. See: Powers v. Coe, 728 F.2d 97, 103 (2d Cir. 1984) (Petitioner alleged a publicity campaign by prosecutors to deprive him of his right to fair trial by disclosing secret evidence that had been presented to the grand jury; the Second Circuit, finding that a prosecutor's dealings with the press were administrative, held that there was no absolute immunity for a prosecutor's "extraneous statements to the press designed to gain unfair advantage at trial"; Helstoski v. Goldstein, 552 F.2d 564, 566 (3rd Cir. 1977) (no absolute immunity for a prosecutor's deliberate leaks to the press in investigation leading to prosecution); and Taylor v. Kavanaugh, 640 F.2d 450 (2d Cir. 1981) (no absolute immunity for distributing extraneous statements to the press).

The lower court has strayed from the functional approach which this Court followed in Butz v. Economu, 438 U.S. 478, 511-12 (1978) and Forrester v. White, 484 U.S. 219, 227 (1988), by granting Respondent Kathe absolute immunity for investigative, rather than prosecutorial, acts. This decision grants Respondent Kathe absolute immunity in an area expressly left open by this Court's decision in Imbler v. Pachtman, *supra*, 424 U.S. 409, 430-1 (1976), and directly contradicts the approach and rationale for

granting such immunity, as subsequently restated in Butz, Forrester, Burns, and Buckley.

In Burns and Buckley, this Court recognized the importance of addressing prosecutorial conduct which the Imbler decision expressly left open. As a result, this Court limited immunity to pertain only to acts which are clearly prosecutorial, rather than investigative. Therefore, this Court should grant the Petition as to this question.

III. THE CALIFORNIA SUPREME COURT'S REFUSAL TO HEAR THIS CASE, SUSTAINING THE APPELLATE COURT'S GRANT OF ABSOLUTE LEGISLATIVE IMMUNITY TO CITY COUNCIL MEMBERS IS AN UNWARRANTED EXTENSION OF THIS COURT'S DECISION IN BRISCOE V. LAHUE, AND IS IN CONFLICT WITH THE SECOND CIRCUIT COURT OF APPEALS'S DECISION IN WHITE V. FRANK, AS WELL AS WITH THE RATIONALE OF BURNS V. REED

The Petitioner alleges that the Respondents, acting individually and in conspiracy with each other, manufactured city documents, regularly held meetings in furtherance of this conspiracy, and participated in the investigation against Petitioner.

Legislative immunity is not an absolute defense to Respondent Hornbuckle, because she was not acting in a legislative capacity. As alleged in the complaint, Respondent Hornbuckle was involved in the investigation (paragraphs 6, 10,

13) and met with other officials outside of the council meetings to conduct unauthorized business (paragraphs 14, 15). The lower court cited Tenney v. Brandhove, 341 U.S. 367, 379 (1951) as the controlling authority for legislative immunity. However, this case applies only where the legislator acted in an area where legislators are traditionally given the power to act. Respondent Hornbuckle clearly was not authorized to conduct an investigation against Petitioner, nor was she authorized to have access to confidential information regarding this investigation, given to her by Respondents Kathe and Roeder. Therefore, the Tenney does not apply to Respondent Hornbuckle.

Respondent Roeder likewise is not entitled to absolute legislative immunity for the main reason that he is not a legislator. As an investigator, he acted outside the scope of his duties as City Manager. He prepared a false document, stating that the City Council voted on the cable contract when it had not.

At best, Respondents Hornbuckle and Roeder fall within the category of an investigative official as set out in Imbler and Briggs, *supra*. As such, they are only entitled to qualified immunity.

The Ninth Circuit reviewed this issue in Trevino v. Gates, 92 D.A.R. 11169 (1992). In Trevino the court stated that :

> "Although a local legislature may vote on an issue, that alone does not necessarily determine that he or she was acting in a legislative capacity. Rather, '[w]hether actions...are, in law and fact, an exercise of legislative power depends not on their form but upon "whether they contain matter which is properly to be regarded as legislative in its character and effect."' INS v. Chadha, 462 U.S. 919, 952, 103 S.Ct. 2764, 2784 (1983) (discussing Congressional action) (citation omitted). "The essentials of the legislative function are the determination of the legislative policy and its formulation and promulgation as a defined and binding rule of conduct." Yakus v. United States, 321 U.S. 414, 424, 64 S.Ct. 660, 667 (1944). "

The court also stated that the more the act is directed solely to private interests, the more likely the act will be construed to be non-legislative in character. Clearly, the allegations made by Petitioner against Respondents fall within the latter factual situation discussed in Trevino. The Respondents here were not acting in a legislative capacity; their acts were dealing with matters which dealt specifically with the alleged acts of a City Council Member running for re-election. The Respondents released the false accusations six days before the election to undermine Petitioner's bid for re-election. These acts clearly demonstrate bad faith of individuals with ulterior motives, not that of legislators with the general public's best interest in mind. For these reasons, the Court should grant the Petition on this issue as well.

IV. RESPONDENT, CITY ATTORNEY KATHE AND PETITIONER HAD AN ATTORNEY-CLIENT RELATIONSHIP

In the complaint, Petitioner alleges causes of action against Respondent Kathe for breach of fiduciary duty, claiming that Respondent Kathe and Petitioner had an attorney-client relationship, which Respondent Kathe breached.

In Ward v. Superior Court, 70 CA3d 23 (1977), the court held that the basis of the attorney-client relationship is not contractual, but is statutory or mandated by a county or city charter. One of Respondent Kathe's duties was to represent city officials, including Petitioner.

Furthermore, it is clearly set out in the 1990 City of Costa Mesa principal budget and program information that Respondent Kathe was to represent the officers of the city in any suit. The duty states the Respondent Kathe "is to defend the city, its officers and employees whenever sued or made a party to any hearing." Moreover, the job description states that Respondent Kathe "is responsible for initiating and defending all lawsuits, including municipal code violations, involving the city, its officers, and staff." Further, while Respondent Kathe was investigating Petitioner, Petitioner asked Respondent Kathe in a study session in

which the subject of Copley Colony Cable arose for legal advise as his attorney. Respondent Kathe indicated that Petitioner should abstain from any discussion regarding Copley Colony, but he did not advise Petitioner that he was actively investigating Petitioner on this very issue, which clearly gives rise to a conflict of interest.

In addition, in Ward the court specifically cited Wutchumma Water Co. v. Baily, 216 C 564 (1932) for the proposition that a public attorney is forbidden from doing two things when he severs a relationship with a client:

> (1) The attorney may not do anything which will injure the former client in any manner previously represented, and (2) he may not use information against his former client acquired by virtue of their previous relationship (*Id.*, at 573,74).

In the present case, Respondent Kathe did both by injuring Petitioner as a City Council Member and client and using information against him obtained by virtue of their previous relationship, and reliance by Petitioner on the advise given to him by Respondent Kathe as his attorney.

Alan Grimes stated in "The City Attorney: a Practice Manual":

> "It has been said that a lawyer for a public against is fortunate inasmuch as he has only one client, the agency. This is not quite true. In a

> general law city in California there are five councilmen, and the attorney often finds himself with five would-be clients. This is where his trouble starts. He has been taught in law school to consider the corporate body as his client. A different of opinion often arises between the City Attorney's view of what is good from a legal aspect for the client and what each councilman believes is best for the client as he or she sees it."

Petitioner alleges such a relationship and legally he should be entitled to have representation. The Petitioner believed that Respondent Kathe was his attorney and that he was protecting his interests. For these reasons, the Court should grant the Petition on this issue as well.

CONCLUSION

For all the above reasons, Petitioner respectfully urges this Honorable Court to grant his Petition for a writ of certiorari on all the issues raised herein.

Respectfully submitted,

Dated: June __, 1994

LAWRENCE K. HARVEY
Attorney for Petitioner
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714/650-7470

PROOF OF SERVICE
STATE OF CALIFORNIA, COUNTY OF ORANGE

I am employed in the County of Orange, State of California. I am over the age of 18 and not a party to the within action; my business address is 2103 Valley Road, Costa Mesa, California 92626.

On June 15, I served the foregoing document described as:

PETITION FOR WRIT OF CERTIORARI

on interested partied in this action by placing [ ] the original [ ] a true copy thereof enclosed in a sealed envelope with postage thereon fully prepaid in the United States mail at Costa Mesa, California addressed as follows:

Mr. Edwin J. Richards, Esq.
Edwin J. Richards & Associates
1055 North Main Street, Suite 922
Santa Ana, CA 92701

Court of Appeals, 4th Dist.
Division Three
925 N. Spurgeon
Santa Ana, CA 92701

Hon. Randall Wilkinson
Office of the County Clerk
700 Civic Center Drive West
Santa Ana, CA 92701

California Supreme Court
303 Second Street
San Francisco, CA 94107

[X] (BY MAIL) I caused such envelope with postage thereon fully prepaid to be placed in the United States Mail. Executed on June 15 1994 at Costa Mesa, California.

[ ] (PERSONAL SERVICE) On the __ day of June 1994, I served a copy of the papers to which this proof of service is attached by personally serving:

I declare under penalty of perjury under the laws of the State of California that the above is true and correct.

Lawrence K. Harvey

APPENDIX A

FILED NOVEMBER 18, 1993

NOT TO BE PUBLISHED

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FOURTH APPELLATE DISTRICT

DIVISION THREE

ORVILLE AMBURGEY,	)	GO13222
Plaintiff and Appellant,	)	(Super. Ct. No. 669203)
v.	)	O P I N I O N
CITY OF COSTA MESA, et al.,	)	
Defendants and Respondents.	)	

APPEAL from a judgment of the Superior Court of Orange County, Randall K. Wilkinson, Judge. Affirmed.

Burns & Oblachinski and Michael F. Burns for Plaintiff and Appellant.

Michael M. McMahon and Edwin J. Richards for Defendants and Respondents.

* * *

Plaintiff Orville Amburgey, former Costa Mesa councilman, was investigated for conflict of interest by the city attorney, who then referred the matter to the Orange County District Attorney. When the district attorney dismissed the charges, Amburgey filed a complaint for damages against the city, its mayor, Mary Hornbuckle, its city manager, Allan Roeder, and its city attorney, Thomas Kathe (collectively respondents). Respondents' demurrer to the first amended complaint was sustained without leave to amend and Amburgey appeals, contending: (1) he had a federally protected right to bring his action; (2) Kathe was entitled only to qualified immunity because he acted as an investigator; (3) Hornbuckle and Roeder were only entitled to qualified immunity because they were not acting in a legislative capacity; and (4) Amburgey and Kathe had an attorney/client relationship which Kathe breached.[1]

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[1] The order sustaining the demurrer without leave to amend is not appealable. (Code Civ. Proc., § 904.1.) However, a judgment of dismissal was entered by the court on July 26, 1993. Therefore, because the parties have briefed the issues, in the interests of justice and to prevent unnecessary delay, we deem the order sustaining the demurrer to incorporate the judgment and treat the notice of appeal as being taken therefrom. (See Munoz v. Florentine Gardens (1991) 235 Cal.App.3d 1730, 1731-132.)

FACTS

Amburgey was a Costa Mesa city council member. He also owned Amburgey Electric, a business which performed subcontract work for a company which provided cable television to the city under a franchise agreement. City Attorney Kathe concluded Amburgey may have violated state conflict of interest laws by voting on a franchise agreement with that company.[2] He informed City Manager Roeder of his conclusions and referred his findings to the district attorney. It was Kathe's belief Amburgey may have committed felonies and Kathe was only empowered to prosecute misdemeanors. Thereafter, the district attorney's office

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[2] Kathe believed Amburgey violated Government Code sections 8710, 87103 and 91000 of the Political Reform Act of 1974. (All statutory references are to the Government Code unless otherwise specified.)

Section 87100 provides in part: "No public official . . . shall make, participate in making or in any way attempt to use his official position to influence a governmental decision in which he knows or has reason to know he has a financial interest."

Section 87103 states in part: "An official has a financial interest in a decision . . . if it is reasonably foreseeable that the decision will have a material financial effect, distinguishable from its effect on the public generally, on the official or a member of his or her immediate family . . ."

Under section 91000, a violation of the Political Reform Act is prosecuted as a misdemeanor.

conducted its own investigation and, after filing a misdemeanor charge against Amburgey, subsequently dismissed all criminal charges.

Amburgey then filed his complaint for damages against respondents, alleging causes of action for deprivation of rights under color of state law (42 U.S.C., §§ 1983, 1988), legal malpractice, breach of fiduciary duty, conspiracy, slander per se, libel per se, intentional infliction of emotional distress, and negligent infliction of emotional distress. The gravamen of the complaint was that respondents injured him by reporting the apparent criminal violations to the district attorney and the press. After respondents' demurrer was sustained with leave to amend, Amburgey filed a first amended complaint, and, at this time, respondents' demurrer was sustained without leave to amend.

The trial court ruled Amburgey's civil rights cause of action failed to allege any violation of a federally protected right, that City Attorney Kathe was entitled to absolute immunity because he was acting in his prosecutorial capacity, and that Mayor Hornbuckle and City Manager Roeder were entitled to absolute legislative immunity. As for the legal malpractice and breach of fiduciary duty causes of action against Kathe, the court ruled the complaint failed to state a cause of action based on an attorney/city relationship.

The court then granted Amburgey's motion for reconsideration and affirmed its prior ruling. This appeal followed.

STANDARD OF REVIEW

In ruling on an order sustaining a demurrer without leave to amend, this court must determine whether the complaint states a cause of action even though "the facts may not be clearly stated, or may be intermingled with a statement of other facts irrelevant to the cause of action shown, or although the plaintiff may demand relief to which he is not entitled under the facts alleged." (Matteson v. Wagoner (1905) 147 Cal. 739, 742; see also Lacher v. Superior Court (1991) 230 Cal.App.3d 1038, 1043.) The question is whether the complaint states a cause of action under any legal theory. (Barquis v. Merchants Collection Assn. (1972) 7 Cal.3d 94, 103.) Moreover, any material fact alleged in the complaint must be assumed true, except for contentions, deductions, or conclusions of fact or law, and allegations contradicted by judicially noticed facts. (Gruenberg v. Aetna Ins. Co. (1973) 9 Cal.3d 566, 572.)

DISCUSSION

A. The Cause of Action for Civil Rights Violations

Amburgey attempted to allege a cause of action for deprivation of rights under color of state law. (42 U.S.C. §§ 1983,

1988.)[3] To state such a cause of action, plaintiff must allege the deprivation of a right, immunity, or privilege guaranteed under federal law. (Parratt v. Taylor (1981) 451 U.S. 527, 535.) Amburgey's first amended compliant alleged respondents deprived him of his rights, privileges and immunities under the United States Constitution in that their actions "amounted to an arbitrary invasion . . . the security of

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[3] 42 U.S.C. section 1983 provides in pertinent part: "Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress."

42 U.S.C. section 1988 states in part: "(a) The jurisdiction . . . conferred on the district courts by the provisions of this Title, and of Title 'CIVIL RIGHTS,' and of Title 'CRIMES,' for the protection of all persons of the United States in the civil rights, and for their vindication, shall be exercised and enforced in conformity with the laws of the United States, so far as such laws are suitable to carry the same into effect; but in all cases where they are not adapted to the object, or are deficient in the provisions necessary to furnish suitable remedies and punish offenses against law, the common law, as modified and changed by the constitution and statutes of law, as modified and changed by the constitution and statutes of the State wherein the court having jurisdiction of such civil or criminal cause is held, so far as the same is not inconsistent with the Constitution and laws of the United States, shall be extended to and governed the said courts in the trial and extended to and governed the said courts in the trial and disposition of the cause, and, if it is of a criminal nature, in the infliction of punishment on the party found guilty."

[Amburgey's] privacy, person and business and were not authorized by law." It further alleged he had a property right in employment as a city council member, that he had the right to be free from stigma, and that he was damaged as a result of stigma caused by respondents and loss of employment as a council member.

As for his contention that respondents deprived him of a property right in the form of employment, Amburgey is correct that government employment may, under certain circumstances, be a protected property interest. However, the mere subjective expectancy of employment does not give rise to a property interest for the purpose of bringing the due process clause into play in an action under 42 U.S.C. section 1983. (See Jones v. Hopper (10th Cir. 1969) 410 F.2d 1329.) A discharged employee must have an "entitlement" to employment before he or she is entitled to a protected property interest. Here, Amburgey had no entitlement to continued employment as a council member. At most, he had a subjective expectancy of continued employment, but no property interest in continuing as a council member.

In addition, the United States Supreme Court has made it clear that an allegation of defamation by a government official does not give rise to a cause of action for civil rights violations. (Paul v. Davis

(1976) 424 U.S. 693, 712.) I Paul the plaintiff claimed government officials violated his rights by including his name on a list of shoplifters which was circulated to businesses, and argued the stigmatization impaired his future employment opportunities. However, the Supreme Court affirmed the dismissal of his action, noting that the mere fact that a state official is the alleged tortfeasor does not give rise to a federal civil rights cause of action and that damage to reputation alone does not rise to the level of a constitutional violation. (Id. at pp. 700-701.) The Supreme Court reemphasized a long line of case law holding that damage to reputation, without more, does not rise to the level of a constitutional violation. (Id. at pp. 702-711.) Accordingly, Amburgey was required to allege that respondents damaged his reputation and altered or extinguished a state law right or status. He failed to do so.

Amburgey argues the Supreme Court held in Paul v. Davis, supra, 424 U.S. 693 that "there is a liberty interest protected by the Fourteenth Amendment when you are dealing with termination of employment benefits . . ." However, Paul makes it clear that a plaintiff may not indirectly bring a defamation action under 42 U.S.C. section 1983 merely because the defendant is a government official, unless he or

she can show stigmatization and the deprivation of a state law right or status.

The "state right" alleged by Amburgey is his "right to run for office and be gainfully employed as a city councilman . . ." However, Amburgey failed to allege facts sufficient to show that respondent altered or extinguished any right. His employment as a council member was altered or extinguished by the voters of Costa Mesa, not respondents.

Amburgey's reliance upon Wisconsin v. Constantineau (1971) 400 U.S. 433 is misplaced. He argues that "where a person's good name, reputation, honor, or integrity is at stake because of what the government is doing to him, notice and an opportunity to be heard are essential." (Id. at p. 437.) However, the Supreme Court in Paul rejected Amburgey's interpretation of the language in Wisconsin v. Constantinuea, stating that the language "could be taken to mean that if a government official defames a person, without more, the procedural requirements of the Due Process Clause of the Fourteenth Amendment are brought into play. If read that way, it would represent a significant broadening of the holdings of [prior Supreme Court cases']." (Paul v. Davis, supra, 424 U.S. at p. 708.) Here, as in Paul, no governmental

action deprived Amburgey of a right he previously held under state law.

Amburgey seeks to rely upon Rodriquez De Quinonez v. Perez (1st Cir. 1979) 596 F.2d 486 for the proposition that he "had a state right to run for office and to be gainfully employed as a city councilman. [He] had a right to be considered equal with other individuals who were also running for that position. The government action in this case deprived him of that right by placing him in an extreme disadvantage to the other candidates . . ." However, Rodriquez De Quinonez is inapposite. There, the plaintiffs were former directors of the Bank of Puerto Rico. The trial court found their removal by the Secretary of Treasury amounted to a violation of a liberty interest because their removal stigmatized them and denied them a right previously held under state law. (Id. at p. 489.) Here, unlike the plaintiffs in Rodriquez De Quinonez, Amburgey has not been able to identify any state right which could have been arguably extinguished by respondents. He claims a state law right to run for and hold office but there is no authority for the source of such a right. Moreover, the plaintiffs in Rodriquez De Quinonez were removed from their positions by a government official. (Id. at p. 488.) Here, Amburgey cannot allege that respondents terminated or removed him from his position. He

was removed by the voters.

Amburgey also seeks to rely upon Haight v. City of San Diego (1991) 228 Cal.App.3d 413 and Lubey v. City and County of San Francisco (1979) 98 Cal.App.3d 340 for the proposition that where there is deprivation of a "liberty" guaranteed under the due process clause, a nontenured employee who is stigmatized as a result of termination is entitled to due process. Again, the argument ignores the fact that in those cases, the plaintiffs were terminated by government employees. (Haight v. City of San Diego, supra, at p. 415; Lubey v. City and County of San Francisco, supra, 98 Cal.App.3d at p. 344.) Any actionable stigma to a plaintiff's reputation must result from his or her termination or dismissal from employment.

Amburgey argues termination is not required, relying on Perry v. Sindermann (1972) 408 U.S. 593. In Perry, the plaintiff brought suit when his employment was not renewed. As with cases involving termination, however, Perry involved a conscious decision by government officials to end the plaintiff's employment, thus triggering the due process requirements. (See e.g., Neu v. Corcoran (2nd Cir. 1989) 869 F.2d 662; Lubey v. City and County of San Francisco, supra, 98 Cal.App.3d at p. 344.)

Here, Amburgey merely alleges he was defamed by respondents. He attempts to turn a potential state law cause of action into a federal civil rights action by alleging a tenuous link between the "stigma" he suffered and his loss of employment. However, he was not terminated, and his employment was in no way curtailed by respondents. He was voted out of office by the voters of the City of Costa Mesa. For these reasons, Amburgey failed to state facts sufficient to show that any federal right was infringed upon, and the trial court properly ruled that he failed to state a cause of action under 42 U.S.C. section 1983.

B. Was Kathe Entitled to absolute Prosecutorial Immunity?

Amburgey next contends City Attorney Kathe was not entitled to absolute prosecutorial immunity because he acted as an investigator. The substance of his allegations is that he was injured because Kathe brought charges against him, then turned the matter over to the district attorney and notified the press. Under a long line of Supreme Court cases, Kathe's actions must be considered prosecutorial and he is entitled to absolute immunity.

In Imbler v. Pachtman (1976) 424 U.S. 409, the United States Supreme Court emphasized the strong public policy considerations

mandating absolute immunity from civil liability for a prosecutor under such circumstances. The court observed that the mere grant of qualified immunity to a prosecutor would undermine his or her performance and that "public trust of the prosecutor's office would suffer if he were constrained in making every decision by the consequences in terms of his own potential liability in a suit for damages." (Id. at pp. 424-425.)

In Briggs v. G[illegible]win (D.C. Cir. 1977) 569 F.2d 10, the Court of Appeals observed that the "crucial inquiry [on the question of immunity] concerns the nature of the official behavior challenged, not the identity or title of the officer responsible therefor." (Id. at p. 21.) The court defined prosecutorial activities as the exercise of "judicial or quasi-judicial discretion." (Ibid.; see also McCray v. Maryland (4th Cir. 1972) 456 F.2d 1, 3-4.)

Read together, Imbler and Briggs establish that a prosecutor is absolutely immune for prosecutorial activities. Here, Kathe's actions justified the grant of absolute immunity.

Section 91001.5 gives a city attorney the power to prosecute violations of the Political Reform Act. Section 42803.5 authorizes a city attorney to prosecute misdemeanor violations occurring in his or her city. Costa Mesa Municipal Code sections 2-401 and 2-408

parallel the Government Code on conflict of interest, and section 1-33 empowers the city attorney to prosecute criminal violations of those conflict of interest provisions. Here, the allegations of Amburgey's complaint compel the conclusion that Kathe was acting as a prosecutor under these provisions.

Although Amburgey claims Kathe's investigative activities damaged him, the complaint alleges only that Kathe and others disclosed the results of their investigation to the press and turned over their results to the district attorney. These actions were part and parcel of the decision by the city attorney to initiate a prosecution as authorized by the Government Code and the Costa Mesa Municipal Code. A prosecutor is absolutely immune from liability under section 1983 for his or her conduct in initiating a prosecution so long as that conduct is "intimately associated with the judicial phase of the criminal process." (Imbler v. Pachtman, supra, 424 U.S. at 430-431; see also Burns v. Reed (1991) 500 U.S. _____, ____ 114 L.ed.2d 547, 558.) Here, Amburgey alleges Kathe engaged in investigative acts. It is true that the Supreme Court in Imbler did not decide whether absolute immunity should extend to "those aspects of the prosecutor's responsibility that cast him in the role of an . . . investigative officer rather than that of an

advocate." (Imbler v. Pachtman, supra, at pp. 430-431.) However, the court noted that "the duties of the prosecutor in his role as advocate . . involve actions preliminary to the initiation of a prosecution and actions apart from the courtroom." (Id. at p. 431, fn. 33.) Here, fairly read, Amburgey's complaint seeks to predicate an action for damages upon the contention that Kathe, "acting within the course and scope of [his] employment," brought criminal charges against Amburgey for conflict of interest, then referred the matter to the district attorney who filed, then dismissed, criminal charges. Kathe was authorized by Government Code sections 91001.5 and 41803.5 to prosecute violations of the Political Reform Act and to prosecute misdemeanor violations occurring in the city. He was similarly empowered by Costa Mesa Municipal Code sections 2-401, 2-408 and 1-33 to enforce conflict of interest laws. Although the complaint states Kathe's actions were investigative, the alleged facts reveal his acts were part of the decision of whether to initiate a prosecution against Amburgey, and as such within his duties as a prosecutor. (Imber v. Pachtman, supra, 424 U.S. at p. 431, fn. 33; Burns v. Reed, supra, 500 U.S. at p. ___. Kathe is entitled to absolute

immunity for the allegations in Amburgey's complaint.[4]

C. Were Hornbuckle and Roeder Entitled to Absolute Legislative Immunity?

Amburgey next argues that Mayor Hornbuckle and City Manager Roeder are not entitled to absolute immunity. Again, we disagree.

As the United States Supreme Court has made clear, a legislator who acts in a sphere of legitimate legislative activity is absolutely immune from civil liability for his or her acts. (See Tenney v. Brandhove (1952) 341 U.S. 367, 379.) In Tenney, the plaintiff charged members of the California Legislature with investigating, then requesting local prosecutorial officials to instigate a criminal action against him. He alleged these acts were not done with a legislative purpose but to "intimidate and silence [him] and deter and prevent him from effectively exercising his constitutional rights . . . " (Id. at p. 371.) The Supreme Court held the legislators were entitled to absolute

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[4] The complaint, while alleging "investigative activities" fails to state facts sufficient to overcome the absolute immunity. Rather, it is a thinly veiled attempt to disguise a cause of action for malicious prosecution, for which a prosecutor is absolutely immune. (Burns v. Reed, supra, 500 U.S. at p. ___, citing Vaselli v. Goff (1926) 265 U.S. 503.)

immunity, stating that investigations are a necessary and well recognized aspect of representative government. (id. at p. 377.) The only question, according to the court, is whether the legislator has acted in an area where legislators traditionally have the power to act. (Id. at -. 379.) Tenney's proclamation as to absolute legislative immunity to state legislators has subsequently been applied to regional and municipal officials. (See, e.g., Lake County Estates, Inc. v. Tahoe Reg'l. Planning Agency (1979) 440 U.S. 391; Healy v. Town of Pembroke Park (11th Cir. 1987) 831 F.2d 989; Atchison v. Raffiani (3rd Cir. 1983) 709 F.2d 96.)

Public policy supports the grant of absolute immunity to legislators acting in an area where they are traditionally empowered to act. Based on the allegations of the complaint, Hornbuckle and Roeder are entitled to absolute immunity.

Moreover, "except as otherwise provided by statute, a public entity is not liable for an injury resulting from an act or omission of an employee of the public entity where the employee is immune from liability." (Govt. Code, § 815.2, subd. (b).) Because respondents Kathe, Hornbuckle and Roeder had absolute immunity for their alleged acts committed within the course and scope of their duties, respondent

City of Costa Mesa cannot be held liable to Amburger either.

D. Did Kathe and Amburgey

Have an Attorney/Client Relationship?

Finally, in his first amended complaint and proposed second amended complaint, Amburgey alleges cause of action against City Attorney Kathe for legal malpractice and breach of fiduciary duty, claiming Kathe for legal malpractice and breach of fiduciary duty, claiming Kathe and he had an attorney/client relationship, which Kathe breached. He ignores the fact that Kathe's client was the City of Costa Mesa and it was the city to which he owed a duty.

In Ward v. Superior Court (1977) 70 Cal.App.3d 23, the Court of Appeal concluded that a county counsel's representation of county officers in civil actions did not alter the fact that county counsel has only one client, the county. (Id. at p. 32; see also Meehan v. Hopps (1956) 144 Cal.App.2d 284, 290 ["attorney for a corporation represents it, its stockholders and its officers in their representative capacity. He in nowise represents the officers personally."].)

In addition, Government Code section 41805 provides that the city attorney charged with prosecutorial discretion shall not represent any person accused of violating an ordinance of the city that

employs the attorney. (See also People v. Pendleton (1979) 25 Cal.3d 371, 379; People v. Rhodes (1974) 12 Cal.3d 1880, 187.) Thus, respondent Kathe was precluded from performing or entering into an any attorney/client relationship with Amburgey concerning the alleged conflict of interest charges.

Amburgey alleges legal malpractice under Government Code section 41801, which provides that "[t]he city attorney shall advise the city officials in all matters pertaining to city business." However, this has no effect on the issue of any relationship between the city attorney and a city council member. Again, section 41801 provides that the city attorney's advice is restricted to "legal matters pertaining to city business." Nothing in section 41801 requires a city attorney to give advice to a city official facing criminal charges.

Here, the allegations of the first amended complaint reveal only that respondent Kathe fulfilled his duty to the city and did not give protection or advice to Amburgey. A city attorney may not be exposed to civil liability for performing his or her duties. Accordingly, Amburgey's complaint fails to state a cause of action for legal malpractice or breach of fiduciary duty.

DISPOSITION

The judgment is affirmed. Respondents shall recover their costs on appeal.

MOORE, ACTING P. J.

WE CONCUR:

WALLIN, J.

CROSBY, J.

APPENDIX B

44TH CIVIL NO.
GO13222

FILED DECEMBER 31, 1992

In the Court of Appeal

FOURTH APPELLATE DISTRICT
State of California
DIVISION THREE

ORVILLE AMBURGEY *Plaintiff,*

vs.

THE CITY OF COSTA MESA, et al., *Defendants.*

APPEAL FROM THE SUPERIOR COURT OF ORANGE COUNTY
HON. RANDALL K. WILKINSON

APPELLANT'S BRIEF

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IN THE COURT OF APPEAL FOR THE STATE OF CALIFORNIA

FOURTH APPELLATE DISTRICT, DIVISION THREE

ORVILLE AMBURGEY, an individual, Plaintiff and Appellant, vs. THE CITY OF COSTA MESA, a Municipal Corporation; THOMAS A. KATHE, City Attorney for the City of Costa Mesa, an individual; ALLAN ROEDER, City Manager for the City of Costa Mesa, and individual; MARY HORNBUCKLE; an individual, and DOES 1-100, inclusive, Defendants and Respondents.	CASE NO: G013222 ORANGE COUNTY SUPERIOR COURT NO.; 66-92-03 APPELLANT'S OPENING BRIEF

FACTUAL BACKGROUND

In June of 1990, Orville Amburgey, plaintiff and appellant herein, was an elected city councilman for the City of Costa Mesa. Mr. Amburgey had held the position of city councilman for four years and was paid as a city councilman during that time. In October of 1990, Mr. Amburgey was involved in a heated re-election campaign to retain his council position. Six days prior to the general election, defendants Mary Hornbuckle, Thomas Kathe, and Allan Roeder released information to the press alleging that Mr. Amburgey had committed a felony while acting as a city councilman.

At Mr. Kathe's insistence, these allegations were also forwarded to the Orange County District Attorney's Office which in turn filed a criminal complaint against Mr. Amburgey for an alleged conflict of interest in violation of California Government Code sections 1090 and 1097. The basis of the compliant was an alleged conflict of interest between Mr. Amburgey and Copley Colony, a cable contractor for television service for the City of Costa Mesa.

In letters to the Orange County District Attorney's Office, Mr. Kathe outlined an investigation that he conducted which he claimed showed that Mr. Amburgey had voted on the cable television contract while at the time of the vote he had a financial interest in the franchise

company. Mr. Kathe based his allegations on a review of city documents, interviews of witnesses, and a review of public records. Defendant Hornbuckle and Roeder assisted Mr. Kathe in conducting his investigation and all these individuals met on several occasions and discussed the progress of the investigation and which avenues should be pursued in developing evidence to substantiate the charges against Mr. Amburgey.

Mr. Amburgey was never questioned nor advised as to the investigation or the conclusions reached by the defendants until he read about it in the newspaper six days before the election. Once he learned of the allegations, Mr. Amburgey conducted his own investigation and learned that the accusations were entirely without merit. Mr. Amburgey presented his evidence to the Orange County District Attorney, who agreed to dismiss the case.

During Mr. Amburgey's investigation, he learned that Mr. Roeder had created certain official city documents that were inaccurate and these documents were used by Kathe and Hornbuckle to substantiate their position. Mr. Amburgey learned that the three defendants, in the manner of their actions, wanted to unseat Mr. Amburgey from the city council and thus were motivated to release the unsubstantiated allegations

without offering him any due process or an opportunity to rebut the allegations. As a result, Mr. Amburgey lost the election and was replaced on the city council.

STATEMENT OF THE CASE

On September 23, 1991, plaintiff filed a complaint against the City of Costa Mesa, Thomas Kathe, Mary Hornbuckle, and Allan Roeder for a deprivation of civil rights, legal malpractice, breach of a fiduciary duty, conspiracy and other related counts. On February 26, 1992, the court sustained the defendant's demurrer to the complaint.

On March 23, 1992, plaintiff filed an amended complaint alleging the same causes of action with a different statement of facts. On June 3, 1992, the court sustained defendant's demurrer to the amended complaint without leave to amend.

On June 16, 1992, plaintiff filed a motion for reconsideration with a proposed second amended complaint. On September 23, 1992, the court reconsidered its prior ruling and the proposed complaint and ordered that the original ruling was to stand. The plaintiff then filed his appeal.

I.

DID THE PLAINTIFF HAVE A FEDERALLY PROTECTED RIGHT SUFFICIENT TO STATE A CAUSE OF ACTION

Plaintiff had a federally protected right at the time of the defendants acts by being an employee of the City of Costa Mesa. The United States Supreme Court addressed this issue in Paul v. Davis, wherein the court held that there is a liberty interest protected by the Fourteenth Amendment when you are dealing with termination of employment benefits (424 U.S. 693, 47 L.Ed.2d 404, 96 S.Ct. 1155).

The Paul case has been analyzed by State Appellate Courts on numerous occasions. As stated in Lubey v. City and County of San Francisco (1979) 98 CA3d 340...

> "But there is an important exception to this rule, which is founded upon the Fourteenth Amendment. It arises where there is a deprival of the "liberty" guaranteed all persons by that amendment's due process clause. The exception will be applied where the probationary employee's job termination, or dismissal, is based on charges of misconduct which "stigmatize" his reputation, or "seriously impair" his opportunity to earn a living (Paul v. Davis, 424 U.S. 693, 702 [47 L.Ed.2d 405, 414, 96 S.Ct. 1155]), or which "might seriously damage his standing or associations in his community" (Board of Regents v. Roth, supra, 408 U.S. 564, 573 [33 L.Ed.2d 548 558}; and to the same effect see (McNeill v. Butz, supra 408 F.2d 314, 319; Daniel v. Porter, supra, 391 F.Supp. 1006, 1010).
>
> Where there is such a deprival of a "liberty interest" the employee's remedy mandated by the Due Process Clause of the Fourteenth Amendment is 'an opportunity to refute the

> charge' [and] to clear his name.'" (Codd v. Velger, supra, 429 U.S. 624, 627 [51 L.Ed.2d 92, 96].) He must be afforded "'"notice and opportunity for hearing appropriate to the nature of the case' before the termination becomes effective."'" (Board of Regents v. Roth, supra, 408 U.S. 564, 570, fn. 7 [33 L.Ed.2d 548,556].)

The Fourth District Court of Appeal has used similar rationale in deciding these cases. As set out in Haight v. City of San Diego (1991) 228 CA3d 413...

> "It is well established "[a] person's protected interests are not infringed merely by defamatory statements, for an interest in reputation alone is not a constitutionally protected liberty interest. [Citation.] Rather, the liberty interest is infringed only when the defamation is made in connection with the loss of a government benefit, such as, ...employment. [Citations.]" (Murden v. County of Sacramento, supra, 160 Cal.App.3d at p. 308.)

interest, that of being employed as a city councilman for the City of Costa Mesa (plaintiff's proposed second amended complaint, paragraph 4). The plaintiff has further alleged that his liberty interest has been deprived based on the misconduct of the defendants in their acts which stigmatized his reputation and seriously impaired his standing in the community (plaintiff's proposed second amended complaint, paragraph 20) (clerk's transcript pg. 231). It is further alleged to earn a living as a city councilman in the future (clerk's transcript pg. 234). Clearly these are protected interests as set out in Wisconsin v. Constantineau (1971)

400 U.S. 507; 91 S.Ct. 507...

Clearly, the government violation of a protected right does not require termination of an employee. As stated in Perry v. Sinderman, (1972) 408 US. 593, 92 S.CT. 2694...

> The first questions presented is whether the respondent's lack of contractual or tenure right to re-employment, taken alone, defeats his claim that the non-renewal of his contract violated the First and Fourteenth Amendments. We hold it does not." (ID. at 2697.)

The protected interest as it applies to government defamation has been further examined by the U.S. District Court 1st Circuit Appeals in Rodriquez v. Perez 596 F2d 486 (1979), wherein the court stated:

> "While defamation by a governmental official, standing alone, does not work a deprivation of liberty protected by the fourteenth amendment, Paul v. Davis, 424 U.S. 693, 96 S.Ct. 1155, 47 L.Ed.2d 405 (1976), governmental action altering a right or status previously held under state law "combined with the injury resulting from the defamation, justifie[s] the invocation of procedural safeguards." Id at 708-09, 96 S.Ct. at 1164. See also Ventetuolo v. Burke, 596 F.2d 476 (1st Cir. 1979). The Fifth Circuit has capsulized the import of Paul v. Davis into the following "stigma-plus" test: "'To establish a liberty interest sufficient to implicate fourteenth amendment safeguard, the individual must be not only stigmatized but also individual must be not only stigmatized but also stigmatized in connection with a denial of a right or status previously recognized under state law'." Dennis v. S & S Consolidated Rural High School District, 577 F.2d 338, 341 (5th Cir. 1978) quoting Moore v. Otero, 557 F.2d at 437. We have said that "when a state holds out a right to citizens to engage in an activity on equal terms with others, a state-recognized status exists." Medina v. Rudman, 545 F.2d 244, 250 (1st Cir. 1976), cert. denied, 434

U.S. 891, 98 S. Ct. 266, 54 L.Ed.2d 177. Here, Title 7, chapter 66 of the laws of Puerto Rico sets forth general terms pursuant to which an individual may serve as director; hence, we think the "plus" of the stigma-plus test is satisfied." (ID. at 489).

In the present case, the plaintiff had a state right to run for office and to be gainfully employed as a city councilman. Plaintiff had a right to be considered equal with other individuals who were also running for that position. The government action in this case deprived him of that right by placing him in an extreme disadvantage to the other candidates by the defamation created by the government employees working for the City of Costa Mesa.

II.

IS A CITY ATTORNEY ABSOLUTELY IMMUNE WHEN HE ACTS AS AN INVESTIGATOR

The Imbler Court granted absolute immunity to prosecutors only in those cases where the prosecutor was acting in a prosecutorial capacity [Imbler v. Pachtman 424 U.S. 409 (1976)]. The Imbler Court was very specific in delineating between prosecutorial activities and those activities which are investigative in nature. Imbler stated:

"It remains to delineate the boundaries of our holding. As noted, supra, at 988, the Court of Appeals emphasized that

each of respondent's challenged activities was an "integral part of the judicial process." 500 F.2d, at 1302. The purpose of the Court of Appeals' focus upon the functional nature of the activities rather than respondent's status was to distinguish and leave standing those cases, in its Circuit and in some others, which hold that a prosecutor engaged in certain investigative activities enjoys, not the absolute immunity associated with the judicial process, but only a good-faith defense comparable to the policeman's. See Pierson v. Ray 386 U.S., at 557, 86 S.Ct., at 1219. We agree with the Court of Appeals that respondent's activities were intimately associated with the judicial phase of the criminal process, and thus were functions to which the full force. We have no occasion to consider whether like or similar reasons require immunity for those aspects of the prosecutor's responsibility that cast him in the role of an administrator or investigative officer rather than that of advocate. We hold only that in initiating a prosecution and in presenting the State's case, the prosecutor is immune from a civil suit for damages under section 1983." (ID. at 430-31).

As the court indicated in footnote 33, there are certain activities that a prosecutor could engage in that say will not fall within the absolute immunity addressed. Instead, he initiated and carried out his own investigation including the interviewing of witnesses, reviewing documents and discussing the case with other officials (clerk's transcript pgs. 231-32). No investigation was done by the police department even though that is their initial duty as evidenced by plaintiff's exhibit C attached to the complaint. In fact, defendants never even filed the case for prosecution but instead presented it to the Orange County District Attorney for prosecution. Clearly, he was acting as an investigator or

policeman not as a prosecutor. As such, he is only entitled to qualified immunity. (Plaintiff's 2nd Amended Complaint, paragraphs 6, 8, 9.)

This concept is supported in the Briggs v. Goodwin/Stafford 569 F.2d 10 (D.C. Cir. 1977) case which states:

> "When a prosecutor is engaged in essentially investigative as opposed to advocatory activities, the considerations of public policy which necessitated a grant of absolute immunity in Imbler no longer control. Regardless of his official status, a prosecutor functioning primarily as an investigator should be accorded only the qualified immunity typically conferred on other investigative officers. The crucial inquiry concerns the nature of the official behavior challenged, not the identity of title of the officer responsible therefore." (ID at 21.)

In the present case, Plaintiff has alleged that the Defendant, Kathe, was acting as an investigator and that as such he is only entitled to qualified immunity. Plaintiff has alleged sufficient facts to put the question to the jury.

III.

ARE DEFENDANTS' HORNBUCKLE AND ROEDER ENTITLED ABSOLUTE LEGISLATIVE IMMUNITY

Plaintiff has stated a cause of action against all defendants for a violation of a federally protected right. As stated in plaintiff's Complaint "all defendants" were involved in investigating the plaintiff. (Plaintiff's 2nd Amended Complaint, paragraph 6.)

Moreover, legislative immunity is not an absolute defense

to Defendant, Hornbuckle, since she was not acting in a legislative capacity. As alleged in the Complaint, Defendant, Hornbuckle, was involved in the investigation (paragraphs 6, 10, 13) (clerk's transcript pgs. 231 and 232) and met with other individuals outside of the normal council meeting to conduct unauthorized business (paragraphs 14, 15) (clerk's transcript pg. 233).

At best, Hornbuckle and Roeder fall within the category of an investigative official as set out in Imbler and Briggs, supra. As such they are only entitled to qualified immunity and not absolute immunity.

The United States District Court for the Ninth Circuit has just reviewed this issue in Trevino v. Gates 92 D.A.R. 11169 (1992). In that case, it was stated that:

> "The Ninth Circuit has formulated the issue in the following ways:
>
> Although a local legislature may vote on an issue, that alone does not necessarily determine that he or she was acting in a legislative capacity. Rather, '[w]hether actions...are, in law and fact, an exercise of legislative power depends not on their form but upon "whether they contain matter which is properly to be regarded as legislative in its character and effect."' INS vs. Chadha, 462 U.S. 919, 952, 103 S.Ct. 1764, 2784, 77 L.Ed.2d 317 (1983) (discussing Congressional action) (citation omitted). "The essentials of the legislative function are the determination of the legislative policy and its formulation and promulgation as a defined and binding rule of conduct." Yakus v. United States,

321 U.S. 414, 424, 64 S.Ct. 660, 667, 88 L.Ed."

The court went on to state that:

> "The more the particular acts of legislators are directed toward the consideration and adoption of legislation of general application, the more clearly the acts are legislative in character. Conversely, the more the particular the act, albeit done by vote of the legislature, is directed solely to private interests, the more likely the act will be construed to be nonlegislative in character. See Hughs v. Tarrant County, Tax., 948 F.2d 918 (5th Cir. 1991). This distinction appears consistent with the policies behind immunity. When legislators deal with legislation which will affect the public at large, there is maximum interest in freeing them from the threat of lawsuits brought by interested private parties who may be harmed by legislation passed for the general good. When legislators address matters of very limited application, (so that the persons whose interests are at odds with those of the public as a whole), it is less defensible to shield the legislators from liability when their acts are in bad faith or otherwise in contravention of clearly established law."

Clearly, the facts presented in plaintiff's proposed complaint fall within the latter factual situation discussed in Trevino. The defendants in this case although city officials were not acting as such. Their acts were dealing with matters of very limited application in that they dealt specifically with the alleged acts of a city councilman who was up for re-election. The defendants decided to release the false accusations six days before the election to undermine plaintiff's bid for re-election. These acts clearly demonstrate bad faith of individuals with ulterior motives, not that of legislators with the general public's best

interest in mind.

IV.

DID ATTORNEY KATHE AND PLAINTIFF HAVE AN ATTORNEY-CLIENT RELATIONSHIP

It has been held that a public attorneys relationship is one of a statutory duty in nature rather than a contractual one. In the present case, plaintiff was a client of Defendant, Kathe, based on the city charter and its contractual agreement with Kathe. As set out in Ward v. Superior Court (1977) 70 CA3d 23...

> "The parties have cited no analogous cases with respect to the application of rule 4-101 in a case involving a public attorney, such as the county counsel, nor has our independent research disclosed any such case. (2) It is to be noted that the basis of the attorney-client relationship in the case of public attorneys is not contractual, as is the case in the normal attorney-client relationship, but rather is statutory or mandated by a county or city charter.

It is clearly set out in the City of Costa Mesa principal budget and program information for 1990 that Defendant, Kathe, was to represent the officers of the city in any suit.

As stated the legal services department is to:

> "(2.) To defend the city, its officers and employees whenever employees whenever sued or made a party to any administrative hearing.

Moreover, the description for the job states:

"DESCRIPTION: This element is responsible for initiating and defending all lawsuits, including municipal code violations, involving the City, its officers, and staff. It represents the City as attorney of record for all civil and criminal litigation and hires and oversees outside counsel when necessary.

A copy of the program budget and description is attached to plaintiff's proposed second amended complaint. Although counsel has cited the leading cases in Ward the court specifically cited Wutchumma Water Co. vs. Baily (1932) 216 C 546 for the proposition that a public attorney is forbidden from doing two things when he severs a relationship with a client.

> (1) The attorney may not do anything which will injure the former client in any manner previously represented and (2) he may not use information against his former client acquired by virtue of their previous relationship. (ID at 573-74).

In the present case, Mr. Kathe has done both by injuring plaintiff as a city councilman and using information against him obtained by virtue of their previous relationship.

As stated by Alan Grimes in "The City Attorney: a Practice Manual":

> "It has been said that a lawyer for a public agency is fortunate inasmuch as he has only one client, the agency. This is not quite true. In a general law city in California there are five councilmen, and the attorney often finds himself with five would-be clients. This is where his trouble starts. He has been taught in law school to consider the corporate body at his client. A difference of opinion often arises between the City Attorney's

view of what is good from a legal aspect for the client and what each councilman believes is best for the client as he or she sees it."

This subject has been the topic of many city attorneys questions and dilemmas as indicated by the League of California Critics paper delivered by Michael Miller in 1979. One thing that is clear is that many commentators recognize that as it stands the city attorney may represent not only the city but council members on an individual basis under various different factual situations. Plaintiff has alleged such a relationship and legally he should be entitled to proceed. The plaintiff believed that Mr. Kathe was his attorney and that he was protecting his interests.

V.

CONCLUSION

Based on the above, plaintiff/appellant prays that the court will reverse the lower courts ruling and allow the plaintiff's proposed second amended complaint be filed.

DATED: December 30, 1992 BURNS & OBLACHINSKI

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APPENDIX C

44TH CIVIL NO.
GO13222

FILED ON MARCH 12, 1992

In the Court of Appeal

FOURTH APPELLATE DISTRICT
State of California
DIVISION THREE

ORVILLE AMBURGEY *Plaintiff,*

vs.

THE CITY OF COSTA MESA, et al., *Defendants.*

APPEAL FROM THE SUPERIOR COURT OF ORANGE COUNTY
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IN THE COURT OF APPEAL FOR THE STATE OF CALIFORNIA

FOURTH APPELLATE DISTRICT, DIVISION THREE

ORVILLE AMBURGEY, an individual, G013222 Plaintiff and Appellant, vs. THE CITY OF COSTA MESA, a Municipal Corporation; THOMAS A. KATHE, City Attorney for the City of Costa Mesa, an individual; ALLAN ROEDER, City Manager for the City of Costa Mesa, and individual; MARY HORNBUCKLE; an individual, and DOES 1-100, inclusive, Defendants and Respondents.	) CASE NO:)) ORANGE COUNTY) SUPERIOR COURT) NO.; 66-92-03)) APPELLANT'S) REPLY BRIEF

I.

PLAINTIFF HAS ALLEGED A VIOLATION OF A FEDERALLY PROTECTED RIGHT

A) Plaintiff had a liberty interest:

Plaintiff has alleged a violation of a federally protected right in That his reputation has been defamed by government officials and as a result of that defamation, his ability to be employed as a city councilman in Costa Mesa or any other city has been seriously affected. The State of California recognizes employment, reputation, business goodwill and the right to hold elected office and be re-elected as significant property interests. (Cal.Gov.Code section 34882 et seq.; Willis v. Santa Ana Hosp. (962) 58 C2d 806, 26 Cal.Rptr.640.

As set out in Kaprelian v. Texas Woman's University (1975) 509 F.2d 133...

> "A liberty interest arises...when one is publicly] subjected to a badget of infamy, such as being "posted" as a drunkard. [Wisconsin v. Constantineau, 400 U.S. 433, 91 S.Ct. 507, 27 L.Ed2d. 515 (1971).] In plaintff's context, it arises when an employee is able to demonstrate that the State has made a charge "that might seriously damage his standing and associations in his community" or that is of such a nature as to impose "a stigma or other disability that foreclosed his freedom to take advantage of other employment opportunities." [Roth, supra, 408 U.S. at 573, 92 S.Ct. at 2707.] Such a showing is the

employee's voucher of admission into the area of due process;" (ID. at 137)

Plaintiff has alleged in his proposed second amended complaint that:

> "...defendants, and each of them, infringed on plaintiff's liberty interests in that he was defamed and stigmatized as a criminal six days before the general election which resulted in the loss of a government benefit, that being employment as a city councilman for the City of Costa Mesa. Moreover, the plaintiff's chances of being an elected official in any capacity have been seriously damaged by the defendants actions in stigmatizing plaintiff's community reputation, without an opportunity to be heard or to defend the allegations." (Clerk's transcript pg. 234; paragraph 20).

Respondent's assertion that the appellant in this case must show an "entitlement" to employment before a protected interest comes into play is simply wrong. The plaintiff is required to show a right to continued employment or that he was terminated by the city. The same argument was presented in Dennis v. S & S Consolidated Rural H.S. Dist. (1978) 577 F.2d 338...

> "Essentially, S & S argues that because Dennis had no property interest in the renewal of his contract, i.e., that his right to continued employment is not recognized under Texas law, he failed to satisfy the "plus" of the "stigma-plus" test. However, the Court in Paul v. Davis anticipated the situation present in the instant case and unambiguously indicated that defamation in the course of declining to rehire a nontenured employee would satisfy the "stigma-plus" test." (ID. at 341).

The court went on to state that:

> "In other words, infliction of a stigma to reputation (or, a fortiori, by a discharge) states a claim for deprivation of liberty without due process within the meaning of the Fourteenth Amendment. Moreover, this combination of stigma plus failure to rehire/discharge states a claim even if the failure to rehire or discharge of itself deprives the plaintiff of no property interest within the meaning of the Fourteenth Amendment. We reach this conclusion because on the fact of Roth itself the Supreme Court found that the plaintiff respondent had no claim of entitlement. Roth, supra, 408 U.S. at 578, 92 S.Ct. 2701."

In the present case, the appellant had a right to continue in his quest for employment as a city councilman or other elected position without arbitrary governmental action that would alter or extinguish that right. Appellant has alleged in his proposed second amended complaint that his chances of being re-elected were significantly altered when the defendants released the defamatory statements that he was a criminal six days before the election without giving him a chance to explain, rebut, or defend his innocense. The actions taken in this case by the defendants, and the means by which they were carried out were clearly intended to eliminate the plaintiff's chances of being re-elected. In the least, they altered his position as compared to the other candidates running. The citizens thought he was a criminal!

When a state holds out a right to citizens to engage in an activity on equal terms with others, a state recognized status exists. Medina v. Rudman 545 F.2d 244 (1st Cir. 1976). That includes running for political office, holding a job, or enjoying a successful business reputation. As set out in the Dennis case:

> "It is the individual's status as a government employee and not his property interest in continued employment which furnishes the "plus" that raises reputation to the level of a constitutionally protected liberty interest." (ID. at 343).

Moreover, the defendants in this case defamed the plaintiff by making accusations that in carrying out his duties as a city councilman he acted in a manner to benefit himself. Defendants accused the plaintiff of engaging in criminal conduct for his own personal gain while carrying out his official duties. These allegations were totally false and without merit. This type of defamation damaged not only the plaintiff's personal reputation but also his business reputation and the goodwill which he had previously established as an honest city councilman.

This type of defamation clearly satisfies the stigma-plus test. As et ou in -Marreno v. City of Hialeah (1980) 625 F.2d 499:

> "...the stigma-plus requirement of Paul has been satisfied: the defamation caused both injury to reputation and damage to a protected or more tangible interest. The reputational interests at stake here are the interests an individual has in being free to move about, live, and engage in his livelihood without the

burden of an unjustified label of infamy. When the government impairs those interests by leveling defamatory charges of a kind which also inescapably harm an individual's protected business interests, the reputational interests rise to the level of liberty interests and the fourteenth amendment demands no less than full compliance with due process of the law." (ID. at 516).

The actions taken by the defendants in this case are strikingly siilar to the facts set out in Owen v. City of Independence (1980) 445 U.S. 635; 100 S.Ct. 1398. In Owen, the plaintiff was the chief of police for the city of Independence, Missouri. The city and the chief of police had previously engaged in sharp disagreements as to the running of the police department. The city council, mayor, and city manager released to the news media allegations and reports that Owen had engaged in inappropriate conduct in executing his duties as police chief that bordered on criminal conduct. The chief had been previously told he would be terminated from the department, for other reasons, by the city manager before the defaming statements were made by the city council and released to the press.

The District Court in Owen found that Owen did have a legitimate liberty interest even though the defamation made by the government officials was not the terminating cause of Owen's employment. The United States Supreme Court has an opportunity to review the Owen case on a different ground but did ratify the lower

court's finding of a liberty interest. In footnote 13, of Owen v. City of Independence, Mo. 445 U.S. 635 100 S.Ct. 1398 the court stated:

> "Although respondents did not cross petition on this issue, they have raised a belated challenge to the Court of Appeals' ruling that petitioner was deprived of a protected "liberty" interest. See Brief for Respondents 45-46. We find no merit in their contention, however, and decline to disturb the determination of the court below.
>
> Wisconsin v. Constantineau, 400 U.S. 433, 437, 91 S.Ct. 507, 510 27 L.Ed.2d 515 (1971), held that "[w]here a person's good name, reputation, honor, or integrity is at stake because of what the government is doing to him, notice and an opportunity to be heard are essential." In Board of Regents v. Roth, 408 U.S. 564, 573, 92 S.Ct. 2701, 2707, 33 L.Ed.2d 548 (1972), we explained that the dismissal of a government employee accompanied by a "charge against him that might seriously damage his standing and associations in this community" would qualify as something "the goverment is doing to him," so as to trigger the due process right to a hearing at which the employee could refute the charges and publicly clear his name. In the present case, the city-through the unanimous resolution of the City Council-released to the public an allegedly false statement impugning petitioner's honesty and integrity. Petitioner was discharged the next day. The Council's accusations received extensive coverage in the press, and even if they did not in point of fact "cause" petitioner's discharge, the defamatory and stigmatizing charges certainly "occur[red] in the course of the termination of employment." Cf. Paul v. Davis, 424 U.S. 693, 710, 96 S.Ct. 1155, 1165, 47 L.Ed.2d 45 (1976). Yet the city twice refused petitioner's request that he be given written specification of the charges against him and an opportunity to clear his name. Under the Court of Appeals correctly concluded that the city's actions deprived petitioneer of liberty without due process of law."

It is clear from the defendants actions that they wanted the

plaintiff removed from office. They couldn't fire him or terminate him, but they could defame him in the public's eye to eliminate his chance of winning re-election. That is exactly what they did! They carried out a secret investigation with false allegations of criminal behavior and then released those allegations to the press six days before the general election. The defendants in commiting these acts denied the plaintiff his liberty by eliminating his chances to compete in a fair election on an equal footing as the other candidates. He was branded a criminal in the hopes that he would not be re-elected.

B) Plaintiff was denied due process:

The plaintiff was denied due process by the defamatory actions taken by the defendants and was not given an opportunity to defend his name prior to the statements being released to the public. The denial of due process resulted in the loss of plaintiff's liberty interest.

The requirements of Procedural Due Process apply to the deprivation of interests encompassed by the Fourteenth Amendment's protection of liberty and property. Board of Regents v. Roth 408 U.S. 564; 92 S.Ct. 2701; 33 L.Ed.2d 548 (1972). As set out in Dennis v. S & S Consolidated, 577 F.2d 338 (1978)...

> "Where, for example, the State has conferred a right upon certain citizens-the right of adults to purchase liquor in

> Wisconsin v. Constantineau, 400 U.S. 433, 91 S.Ct. 507, 27 L.Ed.2d 515 (1971) or the right of licensed drivers to operate a vehicle on state highways in Bell v. Burson, 402 U.S. 535, 91 S.Ct. 1586, 29 L.Ed.2d 90 (1971)-it may not alter or extinguish that right without due process. Similarly, when the government employs an individual, it may not terminate the relationship in a manner which "might seriously damage his standing and associations in his community" or foreclose "his freedom to take advantage of other employment opportunities" without affording him "a due process hearing at which he can make a fair fight to clear his name." (ID. at 342-43).

In the present case, the plaintiff was never given an opportunity to clear his name. As a result, his chance for future employment is still hampered.

Defendants argument that the plaintiff is attempting to make a state law case into a federal case clearly does not hold water. First there is no clear state court remedy, this has been alleged in plaintiff's proposed second amended complaint. (Clerk's Transcript 234-35; paragraph 21). The United States Supreme Court has stated:

> "Our past cases mandate that some kind of hearing is required at some time before a State finally deprives a person of his property interests. The fundamental requirement of due process is the opportunity to be heard and it is an "opportunity which must be granted at a meaningful time and in a meaningful manner." Armstrong v. Manzo, 380 U.s. 545, 552, 85 S.Ct. Parratt v. Taylor (1981) 451 U.S. 540; 101 S.Ct. 1908, 1915.

There are no procedural safeguards set out by the State to provide a hearing to prevent the actions taken by the defendants in this

case. Moreover, there are no post deprivation hearings to correct the actions taken by the defendants. This has also been alleged in the plaintiff's complaint. (Clerk's Transcript page 235, paragraph 21).

To argue that this case is a "font" of tort law to be superimposed on the States is ridiculous. As set out in Zinermon v. Burch 110 S. Ct. 975 (1990)...

> "In Monroe, this Court rejected the view that section 1983 applies only to violations of constitutional rights that are authorized by state law, and does not reach abuses of state authority that are forbidden by the State's statutes or Constitution, or are torts under the State's common law. It explained that section 1983 was intended not only to "override" discrminatory or otherwise unconstitutional state laws, and to provide a remedy for violations of civil rights "where state law was inadequate," but also to provide a federal remedy "where the state remedy, though adequate in theory, was not available in practice." Id., at 173-174, 81 S.Ct., at 476-77. The Court said:
>
> > "It is no answer that the State has a law which if enforced would give relief. The federal remedy is supplementary to the state remedy, and the latter need not be first sought and refused before the federal one is invoked." Id. at 183, 81 S.Ct., at 481.
>
> Thus, overlapping state remedies are generally irrelevant to the question of the existence of a cause of action under section 1983. (ID. at 982)."

No procedural safeguards were in place prior to the defendants actions and no action has been taken since to allow him the opportunity

to clear his name. Consequently, his name has been stigmatized without an opportunity to rebut the allegations.

II.

THE DEFENDANTS ARE NOT ENTITLED TO

ABSOLUTE IMMUNITY

A) The City of Costa Mesa

The City of Costa Mesa is not entitled to absolute immunity. Defendant attempts to bootstrap its immunity to the alleged immunity of its officials by citing California Government Code section 815.2. The defendant's claim that it cannot be liable for any act or injury committed by an employee who is immune is clearly incorrect. The United States Supreme Court set aside such immunity in Owen v. City of Independence (1980) 445 U.S. 621; 100 S.Ct. 1398.

The court stated that there is not traditional immunity for municipal corporations and neither history nor policy supports the granting of qualified immunity. The court went on to hold that "the municipality may not assert the good faith of its officers or agents as a defense to liability under section 1983. (ID. at 1409).

B) The City Attorney

The city attorney is not entitled to absolute immunity because he

was acting as a investigator not as a prosecutor. The Briggs case clearly distinguished the immunity coverage issue limiting it to only prosecutorial functions. The Briggs v. Stafford (D.C. Cir. 1977) 569 F.2d 10 court stated:

> "Regardless of his official status, a prosecutor functioning primarily as an investigator should be accorded only the qualified immunity typically conferred on other investigative officers. The crucial inquiry concerns the nature of the official behavior challenged, not the identity or title of the officer responsible therefor." (ID. at 21).

The rationale set out in Briggs is also found in Ames v. Vavreck (1973) 356 F.Supp 931 wherein the court stated:

> "Although a prosecutor is immune from suit for actions taken within the scope of his official capacity as prosecutor, he will be held liable for civil damages if his actions are of a police/investigative or other similar nature and deprive plaintiffs of Constitutional rights." (ID. at 937).

Plaintiff has alleged facts in his proposed second amended complaint that clearly indicate that he was acting as an investigator, not a prosecutor. Those facts include the reviewing of files, taking statements, interviewing witnesses, and directing others to do the same. (Clerk's Transcript page 232, paragraphs 9 and 10). These are clearly investigative acts.

C) Defendant's Hornbuckle and Roeder

The defendants, Hornbuckle and Roeder are not entitled to

immunity because neither was acting in a legislative capacity. Instead, both individuals removed themselves from the legislative capacity by aiding and assisting in the investigative and dissemination of false information against the plaintiff. The acts were done with a purely private interest in mind, that being the elimination of the plaintiff as a city councilman. As such they do not qualify for immunity. As stated in Trevino v. Gates (1992) 798 F.Supp 621, 623...

> "Although a good and necessary rule, however, the rule that legislators have absolute immunity for their acts is not without drawbacks. Its consequence is that while cloaked with immunity, a legislator can deliberately and willfully inflict grievous injury on anyone, without any color of law, and he cannot be sued. Naturally, therefore, the mere fact that a person happens to be a legislator does not render him absolutely immune from suit for any of his acts. Legislators still must pay their bills, and comply with the speed laws. They are no more free than anyone else to assault people on the street."

In the present case, the defendants have intentionally harmed the plaintiff by disseminating false information about him and under the Ninth Circuit's analysis they should not be entitled to absolute immunity.

III.

THE COURT HAS THE DISCRETION

TO INCORPORATE A JUDGMENT OF DISMISSAL

IN THE ORDER SUSTAINING THE DEMURRER

An order sustaining a demurrer without leave to amend is not an appealable

order. However, several courts have allowed an appeal to proceed for the sake of judicial economy. As set out in Nowlon v. Koram Ins. Center (1991) 1 CA4th 1437...

> "An order sustaining demurrers without leave to amend is not an appealable order. (Code Civ. Proc., section 904.1; Munoz v. Davis (1983) 141 Cal.App.3d 420, 431 [190 Cal.Rptr. 400].) In this case, however, the substantive issued on appeal have been fully briefed by both parties. In the interests of justice and to prevent unnecessary delay, we deem the order sustaining the demurrer as incorporating a judgment of dismissal and treat Nowlon's notice of appeal as applying to the dismissal." (ID. at 1440).

The same rationale was set out in Munoz v. Davis (1983) 141 CA3d 420.

The appellant in the present case, requests that the court incorporate an order for judgment in the order sustaining the demurrers by the lower court.

IV.

CONCLUSION

Appellant respectfully requests that this court set aside the Superior Court's order sustaining the defendant's demurrers and allow the plaintiff's proposed second amended complaint to be filed. Further, that the court find that the appellant has stated a cause of action under section 1983, that the defendants are not absolutely

immune and that there was an attorney-client relationship between appellant and attorney Kathe.

DATED: March 12, 1993

Respectfully submitted,

MICHAEL F. BURNS
Attorney for Plaintifff,
ORVILLE AMBURGEY

APPENDIX D

FILED ON JUNE 23, 1992

SUPERIOR COURT OF THE STATE OF CALIFORNIA

FOR THE COUNTY OF ORANGE

ORVILLE AMBURGEY, an individual, Plaintiff, v. THE CITY OF COSTA MESA, a Municipal Corporation; THOMAS A KATHE, City Attorney for the CITY OF COSTA MESA, an individual; MARY HORNBUCKLE, Mayor of the CITY OF COSTA MESA, an individual; ALLAN ROEDER, City of Manager for the City of COSTA MESA, an individual; and DOES 1-100, inclusive, Defendants.	CASE NO. 66 92 03 JUDGE RANDELL L. WILKINSON DEPT: 19 STATEMENT OF DECISION

The HONORABLE RANDELL L. WILKINSON, Judge, submits the following Statement of Decision relating to Court order that Defendants MARY HORNBUCKLE, Mayor of THE CITY OF COSTA MESA (hereinafter "HORNBUCKLE"), as an individual, and ALLEN

ROEDER, City Manager for the CITY OF COSTA MESA, as an individual (hereinafter "ROEDER") demurrer to Plaintiff's First Amended Complaint be sustained without leave to amend.

Based on the papers submitted and oral argument offered in relation to HORNBUCKLE and ROEDER's Demurrer to Plaintiff's First Amended Complaint, it is determined and ruled with regard to Plaintiff's first cause of action, deprivation of rights under color of State law (42 U.S.C.., 1983, 1988), the Mayor and City Manager were entitled to legislative immunity for their actions taken in the course and scope of their employment, including the investigation and referral of potential criminal charges to the District Attorney in relation to AMBURGEY's activities as a city council member. Immunities applicable to the activities of HORNBUCKLE and ROEDER are discussed at length in Penny v. Brandlove, 341 U.S. 367 (1951); Lake Country Estates v. Tahoe Retional Planning Agency, 440 U.S. 391 (1979); Healey v. Town of Pembroke Park, 831 F.2d 989 (11 Cir. 1987); Aitchison v. Raffiani, 708 F.2d 96 (3rd Cir. 1983); and Hernandez v. City of Lafayette, 643 F.2d 1188 (5th Cir. 1981).

In addition to these immunities, it is determined that Plaintiff's alleged wrongs did not rise to the level of a constitutional deprivation.

Instead, the activities of Defendants and the alleged injuries of Plaintiff are approximately litigated and addressed by the laws of the State of California. McCarthy v. Mao, 827 F.2d 1310 (9th Cir. 1987).

The conduct of HORNBUCKLE and ROEDER, for which Plaintiff bases causes of action five (slander) and six (liable) are subject to absolute immunity under California Civil Code, Section 47. Since all of the activities of Defendants for which Plaintiff complains were performed within the course and scope of their employment as Mayor and City Manager of the CITY OF COSTA MESA, it is concluded that California Civil Code, Section 47 applies in full. Additionally, it is recognized that even where allegations of malice are asserted against the Mayor and the City Manager, they are entitled to the absolute privilege of Civil Code, Section 47(a); O'Shea v. General Telephone Company (1987), 193 C.A.3d 1040, 238 Cal.Rptr. 715; Abraham v. Landcaster Community Hospital (1990), 217 CA.3d 836, 266 Cal.Rptr. 360; Williams v. Taylor (1982), 129 CA.3d 745, 181 Cal.Rptr. 4233.

It is further held these same immunities apply equally to Plaintiff's fourth, sixth, and seventh causes of action in that where Defendants are entitled to absolute immunity for their official duties, any causes of action stemming therefrom are subject to the absolute privilege

afforded to Defendants and thus barred.

Based on the above reasoning and following consideration of the papers submitted, and oral argument heard on behalf of all interested parties, it is ordered that Defendants HORNBUCKLE and ROEDER's demurrer to Plaintiff's First Amended Complaint be sustained. Noting that the applicable immunities apply in full, Plaintiff is prohibited from stating any cause of action against said Defendants. For that reason, the motion to sustains said demurrer is granted without leave to amend.

IT IS SO ORDERED.

_____

JUDGE RANDELLL WILKINSON

FILED ON JULY 10, 1992

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SUPERIOR COURT OF THE STATE OF CALIFORNIA

FOR THE COUNTY OF ORANGE

ORVILLE AMBURGEY, an individual, Plaintiff, v. THE CITY OF COSTA MESA, a Municipal Corporation; THOMAS A. KATHE, City Attorney for the CITY OF COSTA MESA, an individual; MARY HORNBUCKLE, Mayor of the City of Costa Mesa, an individual; ALLAN ROEDER, City of Manager for the City of Costa Mesa, an individual; and DOES 1-100, inclusive, Defendants.	CASE NO. 669203 ASSIGNED FOR ALL PURPOSES TO: JUDGE: RANDALL L. WILKINSON DEPT. 19 STATEMENT OF DECISION REGARDING DEMURRER OF DEFENDANTS CITY OF COSTA MESA, AND THOMAS A. KATHE (Filed concurrently with Motion to Strike Portions of Plaintiff's Complaint and Request for Judicial Notice) DATE: December 31, 1991 TIME: 9:30 a.m. DEPT: 19

After presentation of oral and documentary evidence regarding the demurrer of defendants City of Costa Mesa and Thomas A. Kathe to the first amended complaint Orville Amburgey, the court renders its decision as follows:

1. Plaintiff's first cause of action fails to state a cause of action against defendant Thomas A. Kathe because he is absolutely immune for actions taken in his prosecutorial capacity under Imbler v. Pachtman, 424 U.S. 409 (1976).

2. Plaintiff's first cause of action fails to state a cause of action against defendants City of Costa Mesa and Thomas A. Kathe because plaintiff fails to allege violation of a constitutionally protected right and fails to allege that state laws are inadequate to remedy his wrongs.

3. Plaintiff's first cause of action fails to state a cause of action against defendant City of Costa Mesa because plaintiff fails to identify an official municipal policy or custom that allegedly deprived plaintiff of his constitutional rights.

4. Plaintiff's second and third causes of action, against defendant Thomas A. Kathe only, fail to state a cause of action because plaintiff and Thomas A. Kathe did not have an attorney-client relationship.

5. Plaintiff's second through eighth causes of action fail to state

causes of action against defendant Thomas A. Kathe because he is absolutely immune from liability under Government Code section 821.6 and Civil Code section 47.

6. Plaintiff's fourth through eighth causes of action fail to allege causes of action against defendant City of Costa Mesa because the city is absolutely immune from liability under Government Code section 815.2.

DATED: _____, 1992

_____
RANDELL L. WILKINSON
JUDGE OF THE SUPERIOR COURT

APPENDIX E

FILED ON JUNE 16, 1993

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SUPERIOR COURT OF THE STATE OF CALIFORNIA

FOR THE COUNTY OF ORANGE

ORVILLE AMBURGEY, an individual, Plaintiff, v. THE CITY OF COSTA MESA, a Municipal Corporation; THOMAS KATHE, City Attorney for the CITY OF COSTA MESA, an individual; MARY HORNBUCKLE, Mayor of the CITY OF COSTA MESA, an individual; ALLAN ROEDER, City of Manager for the City of COSTA MESA, an individual; and DOES 1-100, inclusive, Defendants.	CASE NO. 669203 PROPOSED SECOND AMENDED COMPLAINT 1. Deprivation of Rights Under Color of State Law [42 U.S.C. sec. 1983, 1988] 2. Legal Malpractice 3. Breach of Fiduciary Duty

Plaintiff alleges:

1. This is an action for deprivation of constitutional rights under color of state law brought pursuant to the recodification section 1979 of the Civil Rights Act of 1971, Title 42 United States Code, Section 1983, for remedies for defendant's deprivation of plaintiff's civil rights. Plaintiff, ORVILLE AMBURGEY, alleges that defendants have deprived plaintiff of a protected right in that they have denied him due process, loss of a liberty interest, loss of a property right in the form of employment, attached a stigma to his name without due process which resulted in loss of employment.

By this action plaintiff seeks all legal and equitable relief to which he may be entitled, including, but not limited to compensatory and punitive damages, attorney's fees and costs, prejudgment interest, and injunctive relief against all defendants individually and in their office capacities.

2. At all times herein mentioned, plaintiff was and now is a citizen of the United States, and resides in the City of Costa Mesa, Orange County, California. All acts alleged herein occurred within the County of Orange.

3. At all times hereinafter mentioned, Defendant COSTA

MESA was a municipal government and Defendant THOMAS KATHE was the City Attorney for said city: MARY HORNBUCKLE was Mayor/Councilwoman for said city; and ALLAN ROEDER was the City Manager for said city.

In doing all of the things hereinafter mentioned acted under color of their authority as such, under color of their authority as such, under color of the statutes, ordinances, regulations, customs, and usages of the State of California, the City of Costa Mesa and pursuant to the official policy of defendant municipality as created by the Mayor, City Attorney, and/or City Manager acting under color of their authority.

4. At all times mentioned herein, plaintiff, was a City Councilman for the City of Costa Mesa, California employed and paid by said city as an elected official. At the time of the defendant's actions, plaintiff was a candidate for re-election to continue his employment with said city.

5. Plaintiff is ignorant of the true names and capacities of defendants sued herein as DOES 1-100, inclusive, and therefore, sues those defendants by such fictitious names. Plaintiff will amend this complaint to allege their true names and capacities when ascertained. However, plaintiff is informed and believe that each of the fictitiously

named defendants is responsible for plaintiffs damages herein.

6. In or about October 1990, defendants, and each of them, began an investigation of plaintiff with regard to an alleged conflict of interest between plaintiff, as city councilman, and Copley Colony, the official cable franchise operator under contract with the City of Costa Mesa.

7. Defendants alleged that plaintiff violated Government Code sections by voting on the approval of Copley Colony's contract with the City of Costa Mesa; and that plaintiff had a financial interest in Copley Colony Cable.

8. On or before October 1990, Defendant, THOMAS KATHE, the City Attorney for Costa Mesa, took it upon himself to begin an investigation of plaintiff's business dealings with Copley Colony Cable.

9. Defendant KATHE's investigation and acts included, but were not limited to the following, he reviewed city documents; files; records and minutes to establish a conflict of interest. KATHE also interviewed witnesses, took statements, and directed others to do the same under his supervision, and authored confidential memorandums to other City Council members as to the progress of his investigation.

10. At the conclusion of his investigation, Defendant KATHE met with Defendant HORNBUCKLE, and other council members either individually or as a group to discuss the conclusions of Defendant KATHE's investigation.

11. Defendant, KATHE, violated city policy by investigating suspected criminal activity, which by city policy was delegated to the Costa Mesa Police Department. A copy of said policy is attached hereto, marked EXHIBIT "C," and incorporated herein by reference.

12. Moreover, Defendant KATHE, did not act in a prosecutorial capacity pursuant to city policy in that he was investigating alleged criminal conduct as opposed to initiating legal actions to enforce violations of law as set out in the city's policy. A copy of city policy for City Attorney is attached hereto, marked EXHIBIT "D," and incorporated herein by reference.

13. During the course of KATHE's investigation, KATHE disclosed his findings with Defendants ALAN ROEDER, MARY HORNBUCKLE, and DOES 1-10. During their discussions, KATHE represented to others that plaintiff had violated certain Government Code sections which constituted a felony under California law.

14. On or about October 15, 1990, defendants, and each of

them, either collectively or as individuals, met and conducted City Council business in determining to submit the results of Defendant, KATHE's, investigation to the District Attorney for prosecution and to release to the Press information that plaintiff had committed a felony while acting as a City Councilman.

15. The meetings held by defendants were in direct violation of the Brown Act and Government Code sections 54950 through 54961 in that the failed to call an official or public meeting to discuss the forwarding of the allegations to the District Attorney, nor did they advise plaintiff, Councilman, of the business being conducted or subject matter of the meetings or investigations.

16. In or about June of 1989, Defendant, ROEDER, prepared official city documents which he knew or should have known were false in that they falsified official government action which resulted in the allegations being raised against plaintiff of a conflict of interest. Defendant, ROEDER, acted with Defendant, KATHE, in producing these false documents to prove a conflict on the part of the plaintiff and subsequently forwarded them to the District Attorney and Press representing them as accurate.

17. Defendants knew or should have known that plaintiff did

not engage in a conflict of interest in his official capacity as a City Councilman. However, defendants and each of the concealed said allegations from plaintiff denying him the right to due process in defending his innocence and explaining his actions in a City Council hearing or otherwise.

18. Instead, defendants, and each of them, released the falsified information to the Press on or about October 30, 1990 six days prior to the general election in which plaintiff was attempting to be re-elected and continue in his employment with the City of Costa Mesa.

19. Defendants never advised plaintiff of the allegations, nor did they allow him to dispute the allegations prior to the release to the Press six days prior to the general election.

20. In doing the aforementioned acts, defendants, and each of them, infringed on plaintiff's liberty interests in that he was defamed and stigmatized as a criminal six days before the general election which resulted in the loss of a government benefit, that being employment as a city councilman for the City of Costa Mesa. Moreover, the plaintiff's chances of being elected official in any capacity have been seriously damaged by the defendants actions in stigmatizing plaintiff's community reputation, without an opportunity to be heard or to defend the

allegations.

21. Plaintiff alleges that there are no adequate state remedies to warrant a state claim. Further, that the deprivation in this case was a result of a city policy to hold meetings in violation of the Brown Act and the policy of releasing false information without allowing the subject of those accusations due process ratified by elected officials of the City. These acts by city officials were neither random nor unauthorized and do not have pre-deprivation due process safeguard procedures.

22. As a proximate result of defendants' action against plaintiff, as alleged above, plaintiff has been harmed in that plaintiff was subjected to humiliation and indignity, and prevented from transacting his business, and suffered great physical and mental pain and suffering, all to his damage in an amount to be proved at trial.

23. The above-recited actions of the defendants in depriving plaintiff of his constitutionally protected rights were done with evil motive or intent, or with reckless or callous indifference to plaintiff's rights in that the manufacturing and fabrication of the false evidence and presentation of that false evidence to the District Attorney in and for the County of Orange and was done specifically with the intent to injure plaintiff and damage his reputation and chances to be re-elected to the

City Council.

24. On or about July 5, 1991, the plaintiff filed a written claim against the City of Costa Mesa pursuant to California Government Code section 910-946.6. A true and correct copy of that claim is attached to this complaint, incorporated by reference as if fully set forth herein, and labeled EXHIBIT "A."

25. On or about July 9, 1991, the Defendant, CITY OF COSTA MESA, wrongfully rejected the plaintiff's written claim for damages on the basis that it was not timely filed. Plaintiff hereby alleges that the written claim for damages, see attached EXHIBIT "B," was timely filed and was wrongfully rejected by the City of Costa Mesa, California.

SECOND CAUSE OF ACTION

LEGAL MALPRACTICE

[AGAINST THOMAS A. KATHE ONLY]

26. Plaintiff re-alleges and incorporates by reference paragraphs 1 through 25 above, as though fully and completely set out herein.

27. Plaintiff, at all relevant times hereinafter mentioned, was a duly elected City Councilman in and for the City of Costa Mesa,

California and therefore entitled to all of the rights, benefits and duties pertaining thereto.

28. The Defendant THOMAS A. KATHE, at all relevant times hereinafter mentioned, was and is the duly appointed City Attorney in and for the City of Costa Mesa, California. In said position Defendant, KATHE, agreed and accepted to represent the City of Costa Mesa in and for the benefit of the City Council members as a group and individually.

29. Defendant THOMAS A. KATHE is, and at all relevant times herein mentioned, was an attorney at law licensed to practice before all courts of the State of California and was engaged in the practice of law in his capacity as the City Attorney for the City of Costa Mesa, California, and having his principal place of business at the city of Costa Mesa, California.

30. At all relevant times herein mentioned, the Defendant THOMAS A. KATHE's duties as the City Attorney in and for the City of Costa Mesa, California was to advise the City, and its City officials, such as the plaintiff, as to the nature and extent of their legal rights pursuant to Government Code section 41801 and by the undertaking of the Defendant THOMAS A. KATHE in representing the City of Costa

Mesa and its City officials, including the plaintiff. Defendant, KATHE, agreed to represent the City of Costa Mesa, California and it's officers by accepting employment as the City Attorney of the City of Costa Mesa, California, and had a duty to perform such services for the City of Costa Mesa, California, including such services for the plaintiff as a City Councilman.

31. On or about October 12, 1990, the Defendant, THOMAS A. KATHE, failed to exercise reasonable skill and care in undertaking to perform such legal services for the plaintiff and negligently and carelessly failed to advise the plaintiff that a conflict of interest existed between the Defendant KATHE and the plaintiff. Defendant, KATHE, breached his duty to plaintiff by failing to disclose to plaintiff that he was in the process of performing an investigation targeting the plaintiff as a defendant in a criminal action. Moreover, that KATHE was egaged in a conspiracy to falsely fabricate and manufacture evidence to be delivered to the District Attorney in and for the County of Orange, California, and would be used to allow the District Attorney in and for the County of Orange, California to bring the charges hereinabove mentioned against the plaintiff.

32. Had Defendant KATHE exercised proper skill and care in the foregoing matter, the plaintiff would have been properly advised of the conflict of interest and would have had the matter investigated and would have been able to alleviate the subsequent damages by proving the falsity of said allegations prior to the November 1990 City Council election and all the emotional pain, suffering and trauma had the plaintiff known the true facts concerning the conflict of interest.

33. As a proximate result of such negligence, the plaintiff has been damaged in an amount to be proven at the time of trial.

34. Plaintiff did not discover the negligence of the Defendant THOMAS

A. KATHE until May 22, 1991 when Plaintiff received discovery from the District Attorney in and for the County of Orange, California which documented the negligence and involvement of the Defendant THOMAS A. KATHE. Plaintiff through reasonable diligence could not have discovered the negligence of the Defendant THOMAS A. KATHE any sooner.

THIRD CAUSE OF ACTION

BREACH OF FIDUCIARY DUTY

[AGAINST DEFENDANT THOMAS A. KATHE ONLY]

35. Plaintiff re-alleges and incorporates by reference paragraphs 1 through 34 above, inclusive, as though fully and completely set forth herein.

36. As an attorney at law, the Defendant THOMAS A. KATHE owed a fiduciary duty to his client, plaintiff.

37. The Defendant, THOMAS A. KATHE, breached his fiduciary duty to the plaintiff in that the defendant failed to inform the plaintiff of the above described conflict of interest and of the involvement of the defendant in the herein alleged conspiracy to violate plaintiff's Civil rights. Plaintiff alleges that the above mentioned breach of fiduciary duty by the Defendant THOMAS A. KATHE was intentional, willful, and performed with a conscious disregard of the plaintiff's rights. Defendants' conspiracy was undertaken intentionally or with reckless disregard for plaintiff's rights, in a manner that was malicious, willful, and

oppressive, and for which conduct plaintiff claims punitive damages against all defendants except CITY and compensatory damages against

all defendants.

FIRST CAUSE OF ACTION

[DEPRIVATION OF RIGHTS UNDER COLOR OF STATE LAW]

[42 U.S.C. SECTIONS 1983, 1988]

1. For general damages in an amount to be proven at the time of trial;

2. For medical damages in an amount to be proven at the time of trial;

3. For punitive damages, as against all defendants except the City of Costa, California, in a amount appropriate to punish the defendants for their wrongful conduct and set an example for others;

4. For reasonable attorney's fees pursuant to Title 42 of the United State Code section 1988;

5. For costs of suit herein incurred; and

6. For such other and further relief as the court may deem just and proper.

SECOND CAUSE OF ACTION

[AGAINST DEFENDANT THOMAS A. KATHE]

[LEGAL MALPRACTICE]

1. For general damages in an amount to be proven at the

time of trial;

2. For special damages to be proven at the time of trial;

3. For costs of suit herein incurred;

4. Such other and further relief as the court may deem just and proper.

THIRD CAUSE OF ACTION

[AGAINST DEFENDANT THOMAS A. KATHE]

[BREACH OF FIDUCIARY DUTY]

1. For general damages in the amount to be proven at the time of trial.

DATED: June 15, 1992

/s/
MICHAEL F. BURNS
Attorney for Plaintiff

DECLARATION OF MICHAEL F. BURNS

I, MICHAEL F. BURNS, declare:

1. That I am an attorney duly authorized and licensed by the State of California to practice in all courts of said state. I am the attorney representing plaintiff herein.

2. On June 13, 1992, I reviewed the City of Costa Mesa program and budget for 1990-1991 which sets forth the City's programs and the policy for the City for each programs.

3. In reviewing the City's procedures it is clear that the City policy for the City Attorney and the Police Department are separate and entirely different. The policy is for the Police Department to investigate criminal activity and the City Attorney is to initiate legal proceedings and to prosecute such conduct.

4. The City's policy does not refer to the City Attorney as an investigative agency nor does it empower it as such.

5. In addition, the plaintiff in this case met with councilperson, Sandra Genis, since the court's ruling on the demurrer, and has learned that the Defendant, MARY HORNBUCKLE, never discussed MR. KATHE's report or investigation with Ms. Genis prior to releasing it, six days before the election, to the Press.

6. All of these facts are new and have not been alleged in previous complaints and were not discovered until after the hearing on the demurrer.